

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538

4 - - - - - x

5 In the Matter of:

6  
7 Sears Holdings Corporation,

8  
9 Debtor.

10 - - - - - x

11  
12 United States Bankruptcy Court

13 300 Quarropas Street

14 White Plains, NY 10601-4140

15  
16 August 22, 2019

17 10:11 AM

18  
19  
20  
21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24  
25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing  
2 on August 22, 2019 at 10:00 a.m.

3  
4 Objection of Prep Hanover Real Estate LLC to Proposed Cure  
5 Amount and Potential Assumption and Assignment of Unexpired  
6 Lease in Connection with Global Sale Transaction (document  
7 #1903)

8  
9 Cure Objection of Alan Robbins, Benderson Development  
10 Company LLC, Brookfield Properties REIT, Inc., Gray  
11 Enterprises, LP, Graziadio Investment Company, Gregory  
12 Greenfield & Associates, Ltd., LBA Realty LLC, LF2 Rock  
13 Creek LP, Nassimi Realty LLC, Regency Centers, L.P., Site  
14 Centers Corp., Spigel Properties, The Woodmont Company, and  
15 Weingarten Realty Investors Relating to Debtors' Notices of  
16 Assumption and Assignment of Additional Designatable Leases  
17 in Connection with the Global Sale Transactions (related  
18 document(s)3299, 3298, 3211) filed by Robert L. LeHane on  
19 behalf of The Woodmont Company, Spigel Properties, Nassimi  
20 Realty LLC, LF2 Rock Creek LP, Graziadio Investment Company,  
21 Alan Robbins, Benderson Development Company LLC, Brookfield  
22 Property REIT Inc., Gray Enterprises, Gregory Greenfield &  
23 Associates, Ltd., LBA Realty LLC, Regency Centers Corp.,  
24 SITE Centers Corp., Weingarten Realty  
25 Investors (document #3553)

1 Objection of Alan Robbins, Benderson Development Company  
2 LLC, Brookfield Property REIT Inc., Gray Enterprises, LP,  
3 Graziadio Investment Company, Gregory Greenfield &  
4 Associates, Ltd., LF2 Rock Creek, LP, LBA Realty, LLC,  
5 Nassimi Realty LLC, Realty Income Corp., Regency Centers  
6 Corp., Site Centers Corp., Spigel Properties, The Woodmont  
7 Company, and Weingarten Realty Investors to Notices of  
8 Assumption and Assignment of Additional Designatable Leases  
9 (related document(s) 3299, 3298) filed by Robert L. LeHane on  
10 behalf of Alan Robbins, Benderson Development Company LLC,  
11 Brookfield Property REIT Inc., Gray Enterprises, Graziadio  
12 Investment Company, Gregory Greenfield & Associates, Ltd.,  
13 LBA Realty LLC, LF2 Rock Creek LP, Nassimi Realty LLC,  
14 Realty Income Corp., Regency Centers Corp., SITE Centers  
15 Corp., Spigel Properties, The Woodmont Company, Weingarten  
16 Realty Investors (document #3558)

17

18

19 Motion to Authorize: Motion of Debtors for Modification of  
20 Retiree Benefits (document #4635)

21

22 Declaration of William Murphy In Support of Motion of  
23 Debtors (document #4636)

24

25 Objection to Motion Objection of Retirees Committee to

1 Debtors Motion for Modification of Retiree Benefits (related  
2 document(s)4635)

3

4 Joinder of Official Committee of Unsecured Creditors  
5 (document #4887)

6

7 Joinder of Secretary of Labor in Opposition (document #4762)

8

9

10 Notice of Assignment of Unexpired Leases of Nonresidential  
11 Real Property (document #4763)

12

13 Objection to Motion filed by David R Taxin on behalf of 5525  
14 S. Soto St. Associates (document #4829)

15

16 Objection (related document(s)4763) filed by Kenneth  
17 Friedman on behalf of 51st Street Fruitland Ave., LLC  
18 (document #4883)

19

20 Debtors' Omnibus Reply (document #4902)

21

22

23 Motion for Allowance and Payment of Administrative Expense  
24 filed by Christopher Matthew Hemrick on behalf of GroupBy  
25 USA, Inc. (document #3404)

1 Debtors' Omnibus Objection to Vendors Motions for Allowance  
2 and Payment of Administrative Expense Claims (document  
3 #4854)

4  
5 Reply to Motion (related document(s)3404) filed by  
6 Christopher Matthew Hemrick on behalf of GroupBy USA, Inc.  
7 (document #4935)

8  
9 Motion to Allow and Compel Payment of Administrative Expense  
10 Claim Under 11 U.S.C. section 503(b) for Services Provided  
11 to the Debtor Post-Petition filed by Kathleen M. Aiello on  
12 behalf of Aspen Marketing Services, Inc. (document #4001)

13  
14 Debtors' Omnibus Objection to Vendors Motions for Allowance  
15 and Payment of Administrative Expense Claims (document#4854)

16  
17 Joinder to the Replies of Alpine Creations Ltd. and Weihai  
18 Lizaqiao International Coop. Group Co., Ltd. to Debtors'  
19 Omnibus Objection to Vendors' Motions for Allowance and  
20 Payment of Administrative Expense Claims (document #4904)

21  
22 Joinder of Aspen Marketing Services, Inc. To Responses to  
23 Debtors' Omnibus Objection to Vendors' Motions For Allowance  
24 and Payment of Administrative Expense Claims (document  
25 #4918)

1 Motion of MaxColor for Payment of Administrative Expenses

2 filed by Jason Louis Libou (document #4176)

3

4 Debtors' Omnibus Objection (document #4854)

5

6

7 Motion to Compel Payment of Administrative Expenses filed by

8 H. Bruce Bronson, Jr. on behalf of M&S Landscaping Inc

9 (document #4306)

10

11 Debtors' Omnibus Objection (document #4854)

12

13

14 Motion to Allow- Notice of Motion and Motion of Alpine

15 Creations Ltd. To Allow and Compel Payment of Administrative

16 Expense claim Under 11 U.S.C. Sections 503(b)(1) And

17 503 (b)(9)(document #4631)

18

19 Debtors' Omnibus Objection (document #4854)

20

21 Alpine Creations Ltd.'s Reply (document #4893)

22

23 Joinder to the Replies of Alpine Creations Ltd. and Weihai

24 Lizaqiao International Coop. Group Co., Ltd to Debtors'

25 Omnibus Objection to Vendors' Motions for Allowance and

1 Payment of Administrative Expense Claims (document #4904)

2

3 Joinder of Aspen Marketing Services, Inc. To Responses to

4 Debtors' Omnibus Objection (document #4918)

5

6

7 Motion for Payment of Administrative Expenses

8 (document #4689)

9

10 Debtors' Omnibus Objection (document #4854)

11

12

13 Motion for Payment of Administrative Expenses Notice of

14 Motion of Weihai Lianqiao International Coop. Group Co., Ltd

15 To Allow and Compel Payment of Administrative Expense Claims

16 Under 11 U.S.C. 503(b)(1) AND 503 (b)(9) (document #4706)

17

18 Debtors' Omnibus Objection (document #4854)

19

20 Joinder to the Replies of Alpine Creations Ltd. and Weihai

21 Lianqiao International Coop. Group Co., Ltd to the Debtors'

22 Omnibus Objection to Vendors' Motions for Allowance and

23 Payment of Administrative Expense Claims (document #4904)

24

25 Weihai Lianqiao International Coop. Group Co., Ltd's Reply

1 to Debtors' Omnibus Objection (document #4900)

2

3 Joinder of Aspen Marketing Services, Inc. To Responses to

4 Debtors' Omnibus Objection (document #4918)

5

6

7 Motion to Allow/Motion of Vehicle Services Group, LLC d/b/a

8 Rotary, a Dover Company, for Allowance and Payment of

9 Administrative Claim Under 11 U.S.C. 503(b)(1) and 503

10 (b)(9)(document #4728)

11

12 Debtors' Omnibus Objection (document #4854)

13

14 Joinder to the Replies of Alpine Creations Ltd. and Weihai

15 Liznqiao International Coop. Group Co., Ltd. to Debtors'

16 Omnibus Objection to Vendors' Motions for Allowance and

17 Payment of Administrative Expense Claims(document #4904)

18

19 Joinder of Aspen Marketing Services, Inc. To Responses to

20 Debtors' Omnibus Objection (document #4918)

21

22

23 Objection to Notice of Assumption and Assignment of

24 Additional Designatable Leases and to Proposed Cure Amount

25 filed by Dana S. Plon on behalf of Pennsee, LLC. (document



1 #3392)

2  
3  
4 Objection of Vornado Realty L.P. and Certain of its  
5 Wholly-Owned and Controlled Subsidiaries, as Landlord, to  
6 Debtors' Notice of Cure Costs and Potential Assumption and  
7 Assignment of Executory Contracts and Unexpired Leases in  
8 Connection with Global Sale Transaction (related document(s)  
9 1731) filed by Jennifer L. Rodburg on behalf of One Penn  
10 Plaza LLC, 770 Broadway Owner LLC, Vornado Realty L.P.  
11 (document #2109)

12  
13 Statement of Joinder by Vornado Realty L.P. and Certain of  
14 its Wholly-Owned and Controlled Subsidiaries in the  
15 Objection of Various Landlords to Notices of Filing Revised  
16 Proposed Order (I) Authorizing the Asset Purchase Agreement  
17 Among Sellers and Buyer, (II) Authorizing the Sale of  
18 Certain of the Debtors' Assets Free and Clear of Liens,  
19 Claims, Interests and Encumbrances, (III) Authorizing the  
20 Assumption and Assignment of Certain Executory Contracts,  
21 and Leases in Connection Therewith and (IV) Granting Related  
22 Relief (related document(s)2380) filed by Jennifer L.  
23 Rodburg on behalf of 770 Broadway Owner LLC, One Penn Plaza  
24 LLC, Vornado Realty L.P. (document #2422)

1 Objection (Supplemental) of Vornado Realty L.P. and Certain  
2 of its Wholly-Owned and Controlled Subsidiaries, as  
3 Landlord, to Transform Holdco LLC's Notice of Assumption and  
4 Assignment of Additional Designatable Leases (related  
5 documents(s) 3298) filed by Jennifer L. Rodburg on behalf of  
6 770 Broadway Owner LLC, One Penn Plaza LLC, Vornado Realty  
7 L.P. (document #3529)

8  
9  
10 MOAC Mall Holding LLC's Objection to Supplemental Notice of  
11 Cure Costs and Potential Assumption and Assignment of  
12 Executory Contracts and Unexpired Leases in Connection with  
13 Global Sale Transaction filed by David W. Dykhouse on behalf  
14 of MOAC Mall Holding LLC. (document #2199)

15  
16 Objection to 3298 Notice filed by Thomas J. Flynn on behalf  
17 of MOAC Mall Holding LLC. (document #3501)

18  
19 Objection MOAC Mall Holdings LLC's Third Supplemental And  
20 Amended Objections to Debtor's Notice of Assumption and  
21 Assignment of Additional Designatable Leases (document  
22 #3926)

23  
24 Objection Fourth Supplemental (related document(s) 3298)  
25 filed by Thomas J. Flynn on behalf of MOAC Mall Holding LLC.

(document #4450)

Transform Holdco LLC's Reply to MOAC Mall Holdings LLC's (I)  
Objection to Supplemental Notice of Cure Costs and Potential  
Assumption and Assignment of Executory Contracts and  
Unexpired Leases in Connection with Global Sale Transaction;  
(II) Second Supplemental and Amended: (A) Objections to  
Debtor's Notice of Assumption and Assignment of Additional  
Designatable Leases, and (B) Objection to Debtor's Stated  
Cure Amount; and (III) Third Supplemental and Amended  
Objections to Debtor's Notice of Assumption and Assignment  
of Additional Designatable Leases (document #4454)

Transcribed by: Abigail Bayne

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES, LLP

4 Attorneys for Sears Holdings Corporation and affiliates

5 767 Fifth Avenue

6 New York NY 10153-0119

7

8 BY: JACQUELINE MARCUS, ESQUIRE

9 GARRETT FAIL, ESQUIRE

10

11 CLEARY GOTTlieb STEEN & HAMILTON LLP

12 Attorneys for Transform Holdco and its affiliates

13 One Liberty Plaza

14 New York, NY 10006-1470

15

16 BY: LUKE BAREFOOT, ESQUIRE

17

18 DLA PIPER LLP

19 Attorneys for Transform Holdco

20 1251 Avenue of the Americas

21 New York, NY 10020-1104

22

23 BY: RACHEL EHRLICH ALBANESE, ESQUIRE

24

25

1 ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

2 Attorneys for Graziadio and WR Raleigh

3 3 Embarcadero Center, 12th Floor

4 San Francisco, CA 94111-4074

5  
6 BY: IVAN GOLD, ESQUIRE

7  
8 HUNTON ANDREWS KURTH LLP

9 Attorneys for Henry Shahery

10 200 Park Avenue

11 New York, NY 10166

12  
13 BY: PAUL SILVERSTEIN, ESQUIRE

14  
15 DAHAN & NOWICK, LLP

16 Attorneys for 5525 South Soto Street Associates

17 123 Main Street, 9th Floor

18 White Plains, NY 10601

19  
20 BY: DAVID R. TAXIN, ESQUIRE

1 BRONSON LAW OFFICES, P.C.

2 Attorney for M&S Landscaping, LLC

3 480 Mamaroneck Avenue

4 Harrison, NY 10528

5

6 BY: H. BRUCE BRONSON, JR., ESQUIRE

7

8 WALSH PIZZI O'REILLY FALANGA, LLP

9 Attorneys for Group By USA, Inc.

10 Three Gateway Center

11 100 Mulberry Street, 15th Floor

12 Newark, NJ 07102

13

14 BY: CHRISTOPHER MATTHEW HEMRICK, ESQUIRE

15

16 WACHTEL MISSRY, LLC

17 Attorneys for MaxColor, LLC

18 885 2nd Avenue

19 New York, NY 10017

20

21 BY: JASON LOUIS LIBOU, ESQUIRE

22

23

24

25

1 TARTER, KRINSKY & DROGIN, LLP

2 Attorneys for Alpine Creations, Ltd.

3 1350 Broadway

4 New York, NY 10018

5

6 BY: ROCCO CAVALIERE, ESQUIRE

7

8 MONTGOMERY MCCrackEN, ATTORNEYS AT LAW

9 Attorneys for Vehicle Service Group, LLC

10 437 Madison Avenue

11 New York, NY 10022

12

13 BY: EDWARD SCHNITZER, ESQUIRE

14

15 THE SARACHEK LAW FIRM

16 Attorneys for Mingle Fashion, Ltd.

17 101 Park Avenue, Floor 27

18 New York, NY, 10178-3099

19

20 BY: JOSEPH SARACHEK, ESQUIRE

21

22

23

24

25

1 ALSO PRESENT TELEPHONICALLY:

2

3 MANATT, PHELPS & PHILLIPS, LLP

4 Attorneys for 51st Street Fruitland LLC

5 11355 W. Olympic Blvd.

6 Los Angeles, CA 90064

7

8 BY: CARL GRUMER, ESQUIRE

9

10 LAW OFFICE OF SAUL REISS, PC

11 Attorney for Henry Shahery

12 2800 28th Street, Suite 328

13 Santa Monica, CA 90405

14

15 BY: SAUL REISS, ESQUIRE

16

17 NEALE BENDER YOO & BRILL, LLP

18 Attorneys for Weihai Lianqiao International Coop. Group

19 Co., Ltd.

20 10250 Constellation Boulevard, Suite 1700

21 Los Angeles, CA 90067

22

23 BY: TODD ARNOLD, ESQUIRE

24

25



1 P R O C E E D I N G S

2 THE COURT: Okay. Good morning. In re: Sears  
3 Holdings Corp, et al.

4 MS. MARCUS: Good morning, your Honor. Jacqueline  
5 Marcus, Weil, Gotshal & Manges, on behalf of Sears Holdings  
6 Corporation. Your Honor, before we get started with the  
7 agenda this morning, I wanted to take things a little bit  
8 out of order. Item number 3 on the agenda is the Motion of  
9 the Debtors for modification of retiree benefits. As the  
10 court knows, and for the record, we just had a chambers  
11 conference at which attorneys for the debtors, the  
12 creditors' committee and the retiree committee participated,  
13 and we agreed that that motion would be adjourned. We are  
14 going to check with your Court -- excuse me, with your  
15 clerk -- as to date, sometime before the confirmation  
16 hearing. So with that adjournment, your Honor, I think  
17 there are several people in the courtroom that would like to  
18 be excused.

19 THE COURT: Okay. That's fine. And the purpose  
20 of the adjournment is for the discussion and analysis -- or  
21 analysis and discussion. So I'll confirm or look upon the  
22 TA that you submitted some time ago. You have a  
23 contested -- you brought in half of an exhibit from the  
24 confirmation hearing for that motion. And if there's a  
25 settlement of the 1114 issues you could proceed by notice of

1 presentment. We won't need that half-day adjourn date for  
2 that. I just want to make sure that you and the retiree  
3 committee have thought carefully on how to send that notice  
4 out to the parties to the Securion contract.

5 MS. MARCUS: We'll do that, your Honor. And we  
6 have the information. So it -- being optimistic, we'll  
7 start assembling that so that we'd be able to provide notice  
8 promptly, when we settle.

9 THE COURT: Okay. Very well. Thank you.

10 MS. MARCUS: Thank you, your Honor.

11 THE COURT: All right. So everyone who is here on  
12 the 1114 matter doesn't need to stay. You could stay if you  
13 want to, but there's no reason to.

14 UNIDENTIFIED SPEAKER: Thank you, your Honor.

15 UNIDENTIFIED SPEAKER: Thank you, your Honor.

16 THE COURT: Okay.

17 MS. MARCUS: Turning to the agenda, your Honor,  
18 the first matter on the agenda is an uncontested  
19 lease-related matter, and that's going to be handled by Luke  
20 Barefoot from Cleary on behalf of Transform.

21 THE COURT: Okay.

22 MR. BAREFOOT: Good morning, your Honor. Luke  
23 Barefoot from Cleary Gottlieb Steen & Hamilton for Transform  
24 Holdco and its affiliates. Your Honor, before we move into  
25 the lease matters that are up for hearing today, with your

1 Honor's permission I'd like to give you a brief status  
2 update of where we are on lease assumption --

3 THE COURT: Sure.

4 MR. BAREFOOT: -- maybe by way of providing your  
5 Honor and all the parties comfort that we are reaching the  
6 end of the road with respect to contested lease assumption  
7 matters.

8 THE COURT: Okay.

9 MR. BAREFOOT: Since our mega hearing on May 13th,  
10 we've reached resolution with landlords with respect to  
11 assumption and assignment of leases covering a total of 42  
12 locations. Just to break that down a little, this court has  
13 already entered orders governing assumption and assignment  
14 with respect to 26 of those locations.

15 We have on notice of presentment a consensual  
16 assumption and assignment order, for which the objection  
17 deadline will pass today, that governs another 13 locations,  
18 and then there are three locations that are on the hearing  
19 today where we've reached resolutions with the landlords and  
20 where, with your Honor's permission, we would propose to  
21 just submit those consensual orders, which are substantially  
22 in the form of the orders this Court has already entered to  
23 your Honor's chambers electronically.

24 THE COURT: Okay.

25 MR. BAREFOOT: Those two -- those three locations

1 -- excuse me -- are agenda item number one, which is Store  
2 1243 in Hanover, Massachusetts, and then agenda item number  
3 14, which covers two stores locations in Manhattan; Store  
4 Number 7749 and 7777.

5 THE COURT: Okay.

6 MR. BAREFOOT: Where that leaves us now, your  
7 Honor, is with only six leases left, where -- six locations  
8 left -- where we do not yet have consensual resolution. One  
9 of those is set down for hearing tomorrow; the Mall of  
10 America dispute. We're in the process of negotiating  
11 substantive agreements with respect to an additional two of  
12 those landlords for the stores in Baldwin Hills, Colorado  
13 [sic] and the distribution center in Brighton, Colorado.  
14 We've extended the 365(d)(4) deadline for both of those  
15 stores. We do not expect to need the hearing dates that we  
16 have set down for those and are very optimistic that we'll  
17 be able to submit those on notice of presentment.

18 THE COURT: Have you let Ms. Lee know that,  
19 because that would free up time for things like that the  
20 1114 matter.

21 MR. BAREFOOT: Your Honor, those are on -- those  
22 are set down for omnibus hearing dates. We will communicate  
23 with Ms. Lee to make sure that there's no confusion about  
24 that, but there's not a separate or substantial amount of  
25 time set down for those.

1 THE COURT: Okay. All right.

2 MR. BAREFOOT: That leaves two additional leases  
3 where you'll be hearing from Counsel for those, which is  
4 being handled by DLA Piper, where there's going to be a  
5 status conference today to set down an evidentiary hearing  
6 for the stores in Raleigh, North Carolina and Temple City,  
7 California.

8 And then the last of those six remaining items is  
9 the contested matter that we have today with respect to the  
10 store in Philadelphia, Pennsylvania, which is agenda item  
11 number 13.

12 THE COURT: Okay.

13 MR. BAREFOOT: So with your Honor's permission,  
14 it's slightly out of order, but I propose to turn to agenda  
15 item number 13.

16 THE COURT: Okay. Now, I appreciate the update.  
17 Let me say two things, and maybe it's less onerous given  
18 that -- it looks like there's really a very small number of  
19 potentially contested matters pertaining to assumption and  
20 assignment to Transform.

21 The first is that there are several -- we  
22 discovered several motion to seal on the docket that weren't  
23 noticed to chambers by e-mail related to motions for  
24 assumption and assignment. You know, and it may be that  
25 those are all moot at this point because you've reached

1 agreements with people and you didn't need to go ahead to  
2 litigate, but I would ask -- and it may not be your firm.  
3 It may be DOJ Piper, but, you know, it -- someone -- DLA  
4 Piper, excuse me -- someone should look at it at the docket  
5 to see the motions to seal, that have not yet been  
6 addressed.

7 That isn't the one that Ms. Albanese sent to  
8 chambers earlier this week connected with MOAC; that's a  
9 separate -- I'm aware of that one, 'cause that was e-mailed  
10 to chambers, but there are a few that were not e-mailed to  
11 us. Maybe they're moot, in which case, it's fine; they can  
12 be withdrawn. But if they're still live, you should e-mail  
13 the -- you know, following procedure on the chambers' Web  
14 site for motion to seal, which includes e-mailing them to  
15 chambers.

16 MR. BAREFOOT: Understood, your Honor. We'll  
17 coordinate and address that promptly.

18 THE COURT: All right. And then the second point,  
19 and this is not to be critical, 'cause I appreciate that the  
20 primary focus of both the assignee and the landlords is  
21 where it should be, which is on potentially negotiating a  
22 solution to the cure and adequate objections. But where  
23 those negotiations don't end up in an agreement, and there  
24 is going to be a contested matter before the Court, we just  
25 need more organization of the underlying materials so that

1 we could prepare for the contested hearing -- the  
2 evidentiary hearing.

3 Like you did with the hearing on store in Los  
4 Angeles, with the declarations, the evidence book, and  
5 everything submitted not, you know, 4:00 p.m. the day before  
6 the hearing, but at least a day before the hearing so we can  
7 focus on the issue and prepare for the hearing.

8 And maybe this just means that when you're  
9 negotiating with the remaining parties, you have to say,  
10 look, this is our drop-dead date; it's not the day of the  
11 hearing, it's two days before, so we can get all the  
12 materials to the judge.

13 MR. BAREFOOT: Understood, your Honor.

14 THE COURT: Okay. And I think the other side in  
15 these disputes knows this in each case, 'cause they're  
16 represented by counsel that's been active in these cases.  
17 But, again, my practice is to take the direct testimony by  
18 declaration and read exhibits, you know, any disputed  
19 exhibits be in a separate binder, and all of those things to  
20 chambers so that we can prepare for the hearing and know  
21 what the real issues are.

22 MR. BAREFOOT: Understood, your Honor.

23 THE COURT: Again, I'm not being critical, because  
24 I much prefer you all settle these things, but just when  
25 it's not going to turn out that way, we just need that extra

1 time for the preparation for an evidentiary hearing.

2 MR. BAREFOOT: We will make sure to do that, your  
3 Honor.

4 THE COURT: Okay. All right. So you wanted to  
5 turn to the Pennsee matter, the Philadelphia store?

6 MR. BAREFOOT: Correct, your Honor; agenda item  
7 number 13.

8 THE COURT: Okay.

9 MR. BAREFOOT: Your Honor, on this lease, the  
10 lease was originally designated on April 19th for assumption  
11 and assignment to Transform Leaseco, LLC. The landlord's  
12 counsel filed a cure cost objection on April 26th, raising a  
13 discrete number of issues. Since that time,  
14 Transform -- time to assume and assign the lease under  
15 365(d)(4) was extended several times and will now expire at  
16 the end of August.

17 Since that time, counsel for Pennsee has withdrawn  
18 and no replacement counsel has been -- has accompanied or  
19 been identified to Transform. That leaves us in a position  
20 where we need to move forward with the assumption and  
21 assignment before the expiration of the 365(d)(4) deadline,  
22 and in any event, as set forth in our reply, your Honor, we  
23 believe that all of the issues that were raised in the April  
24 26th objection by prior counsel have either been resolved or  
25 addressed through the form of order and this Court's prior



1 rulings on substantially similar leases.

2 THE COURT: And that's as set forth in the reply?

3 MR. BAREFOOT: That's correct, your Honor. There  
4 are four discrete issues in that reply, and I'm happy to  
5 tick through them, if that would be helpful.

6 THE COURT: Well, let me just ask; is anyone here  
7 for Pennsee, for the landlord of the Philadelphia store; the  
8 Roosevelt Boulevard, Philadelphia store? All right. I'm  
9 not aware of signing an order authorizing counsel to  
10 withdraw under Rule 2090-1, or local rule 2090-1. Maybe  
11 that was the case, but ...

12 MR. BAREFOOT: Your Honor, there was an order  
13 entered --

14 THE COURT: I did authorize it? Okay. All right.

15 MR. BAREFOOT: That's correct, at docket item  
16 4808. It was entered on August 9th.

17 THE COURT: August 9th. So it's been over ten  
18 days. I mean, they're always on notice to the client, so  
19 the client should have known that ...

20 MR. BAREFOOT: Your Honor, we had been advised  
21 sometime before that counsel intended to withdraw and have  
22 inquired several times about successor counsel and have  
23 not received any responses.

24 THE COURT: All right. So why don't you go  
25 through the issues. And I've reviewed the objection, which

1 was fairly nebulous, and then the reply, which dealt with  
2 the issues raised in the objection.

3 MR. BAREFOOT: Certainly, your Honor. The first  
4 issue is cure. Counsel did not in their objection raise any  
5 current defaults or amounts that were due and payable as of  
6 the time of the objection, and instead raised only the  
7 potential that there would be reconciliations or common area  
8 maintenance that would subsequently become due, but related  
9 in whole or in part to a reassignment time period.

10 Consistent with all the other orders we've  
11 provided, our form of order makes clear that if those  
12 amounts subsequently become due, Transform will pay them  
13 when due in accordance with the terms of the lease, even if  
14 they partially relate to reassignment time periods.

15 THE COURT: All right. And we want to make that  
16 clear.

17 MR. BAREFOOT: Correct, your Honor.

18 THE COURT: So that aspect of the cure objection  
19 is overruled or denied.

20 MR. BAREFOOT: The second issue that it raised,  
21 your Honor, was the need for insurance certifications that  
22 were required under the terms of the lease. Those  
23 certifications were delivered to counsel and, prior to her  
24 withdrawal, she did confirm that they were acceptable to the  
25 landlord.

1 THE COURT: They were sent on the 8th?

2 MR. BAREFOOT: Correct, your Honor.

3 THE COURT: Right.

4 MR. BAREFOOT: The third issue is restrictive  
5 covenants, consistent with any landlord that objected on  
6 stripping of restrictive covenants, the proposed order is  
7 clear that Transform will perform in accordance with the  
8 lease and that there will be no interference or modification  
9 to any restrictive covenants that are applicable.

10 THE COURT: That was also stated in the reply.

11 MR. BAREFOOT: And then, finally, your Honor,  
12 counsel raised inadequate assurance objection. Subsequent  
13 to that April 26th objection, the landlord received the same  
14 adequate assurance package that every other landlord  
15 received, including balance sheet information, a form of  
16 guarantee for Transform Midco, an organizational chart and  
17 certain other related materials that your Honor has seen.  
18 Following the provision of that information, we received no  
19 follow-up requests for information or additional details  
20 concerning adequate assurance of future performance.

21 THE COURT: Just to be clear, the objection said  
22 merely that they hadn't gotten anything yet and then you  
23 sent it afterwards.

24 MR. BAREFOOT: That's fair, your Honor. And after  
25 sending that, we received no further requests or anything of

1 the like.

2 THE COURT: Right. They also -- one last point  
3 raised in the cure objection was they said that there might  
4 be issues with garbage pickup or vandalism, but they didn't  
5 really identify what they were and, again, that's -- again,  
6 part of -- if those can be identified and they're now at  
7 cure amount, then Transform is obligated under the order to  
8 pay them, or to cure -- or fix them.

9 MR. BAREFOOT: That's correct, your Honor. And  
10 Transform was aware of certain garbage issues that they have  
11 now resolved, and as of this hearing, Transform is not aware  
12 of any other current issues that would constitute violations  
13 or defaults under the lease.

14 THE COURT: Okay. All right. So I will overrule  
15 the objection in full and enter the standard assignment  
16 order -- assumption and assignment order than you could  
17 e-mail to chambers.

18 MR. BAREFOOT: Very good, your Honor. We'll  
19 submit that electronically.

20 THE COURT: Okay.

21 MR. BAREFOOT: I'll turn the podium back over to  
22 Ms. Marcus.

23 THE COURT: Okay.

24 MR. BAREFOOT: Thank you. Oh, I apologize, your  
25 Honor. Excuse me. The next item on the agenda was not for

1 Ms. Marcus; it was for Rachel Albanese from DLA Piper and  
2 Ivan Gold from Allen Matkins concerning the status  
3 conference on Graziadio and Raleigh, North Carolina.

4 THE COURT: Yes. Right.

5 MR. BAREFOOT: Apologies, your Honor.

6 THE COURT: That's no problem.

7 MS. ALBANESE: Good morning, your Honor.

8 THE COURT: Good morning.

9 MS. ALBANESE: Rachel Albanese of DLA Piper on  
10 behalf of Transform with respect to certain real estate  
11 matters.

12 Today's conference is on the assumption and  
13 assignment of two leases with landlords Graziadio and  
14 Weingarten Realty, relating to stores in Temple City,  
15 California and Raleigh, North Carolina respectively.

16 THE COURT: Right.

17 MS. ALBANESE: As Mr. Barefoot said, Mr. Gold is  
18 here on behalf of those landlords. The matter has been  
19 briefed and the parties are proceeding on a dual track of  
20 settlement discussions and also preparation for a potential  
21 evidentiary hearing.

22 THE COURT: Okay. Well, it's sort of been  
23 briefed. It's kind of a moving target. It's not clear to  
24 me -- and I don't want you to get into the settlement  
25 discussions -- and apropos of what I just said, what you

1 would tell me today might not end up to be the issues that  
2 would all come before me in a contested hearing.

3 But I think you need to let me know, again, at  
4 least a day before a contested hearing what the remaining  
5 issues are, because the objection, as was fine because it  
6 was an early --

7 MR. BAREFOOT: May.

8 THE COURT: -- it was a long time ago; let's put  
9 it that way. It was an early -- in response to the notice  
10 of -- that it was a designated lease, raised fairly  
11 amorphously adequate assurance, and then cure. Cure, I  
12 think, has been a subject of discussion back and forth. I  
13 just need to know, again, if you're going to have a contest,  
14 what's left; is it adequate assurance? If so, what aspect?  
15 And if it's cure, again, what's the discrete issue or issues  
16 that the parties are fighting over, because ...

17 MS. ALBANESE: Understood, your Honor, and we'll  
18 coordinate to make that clear to chambers before.

19 THE COURT: Okay. All right. And I saw you  
20 nodding when I was talking about, you know, the -- my  
21 procedure for having the direct testimony and the witness  
22 here for cross and the joint exhibit book and the like,  
23 so ...

24 MR. GOLD: Yes, your honor. And for the record,  
25 Ivan Gold of Allen Matkins for Graziadio and WR Raleigh.

1 You previously admitted me pro hoc vice at docket 1222.

2 Completely agree with your Honor's comments. Our  
3 contemplation, we've been in communication with Ms. Lee  
4 regarding a potential date in October. We will have a  
5 further a (d)(4) extension that tracks that.

6 THE COURT: Okay.

7 MR. GOLD: Our contemplation, as Ms. Albanese  
8 acknowledged, you know, we are dual-tracking -- settlement  
9 discussions at both locations are active. But as your Honor  
10 noted, you know, some of our briefing in this goes back to  
11 January.

12 THE COURT: Right.

13 MR. GOLD: And the most recent is May. We do  
14 have -- actually, we had declarations on file, but we're  
15 primarily focused on the shopping center standard at both  
16 locations.

17 THE COURT: Uh-huh.

18 MR. GOLD: It's our contemplation on both sides  
19 that we would in advance of the hearing -- and it would be  
20 potentially more than the day or two even --

21 THE COURT: Well, I hope so.

22 MR. GOLD: -- your Honor, is we contemplate kind  
23 of a scheduling stipulation that would provide us with the  
24 opportunity, both sides, to update our briefing and focus,  
25 just preview of coming attractions -- there is no use issue;

1 it's Kmart to Kmart. There's no tenant mix issues; Kmart to  
2 Kmart.

3 We have a pretty discrete adequate assurance  
4 issue, (b)(3)(a) versus (f) versus (l) of 365 that's kind of  
5 hinted at in the briefing you've seen so far, but,  
6 obviously, we would tighten that up for your Honor based on  
7 the evidence at discovery.

8 I think the reply -- with apologizes to DLA -- I  
9 think it kind of overstates where we are in discovery; we  
10 are proceeding. We just agreed on a confidentiality  
11 protocol. So a few more things are going, and not  
12 elaborate --

13 THE COURT: Okay.

14 MR. GOLD: -- discovery; it's pretty focused. But  
15 our contemplation is we've been offered a couple dates in  
16 October after your Honor is back. We would put a  
17 stipulation together --

18 (Microphone feedback.)

19 THE COURT: Can you fix the mike? You did  
20 something with the microphone, if you can just ...

21 MR. GOLD: Don't touch.

22 THE COURT: There we go. Great. Thank you.

23 MR. GOLD: I should probably ask for permission to  
24 approach. So Counsel requires --

25 THE COURT: Is there still a cure dispute?



1 MR. GOLD: To be very precise, your Honor, as to  
2 Graziadio, as to prepetition cure, there is no dispute; the  
3 parties have agreed on the amount. There's actually an  
4 accumulated post-petition issue that is being addressed  
5 directly. And similar to what Mr. Barefoot -- there are  
6 ways to clean that up even if it's not resolved at the time  
7 of the hearing.

8 THE COURT: Right.

9 MR. GOLD: Similar issue with the Weingarten  
10 location in Raleigh. I don't believe there is a prepetition  
11 cure amount, but there are some post-petition -- strictly  
12 monetary, so we're not dealing with, you know, covenant --  
13 fact intensive covenant defaults.

14 THE COURT: Okay. I appreciate that.

15 MR. GOLD: So something that we could say, this is  
16 what's in dispute. We could escrow it easily, provided  
17 for --

18 THE COURT: Okay.

19 MR. GOLD: -- in an order or a stipulation. We  
20 also contemplate stipulated facts.

21 THE COURT: Okay. So primarily with --

22 MR. GOLD: The least documents, and stuff --

23 THE COURT: So primarily -- if it comes to me,  
24 it's going to be on a discrete adequate assurance issue or  
25 two.

1 MR. GOLD: Yes, sir. And it's -- I think we're  
2 looking, your Honor, at half the day, I believe --

3 THE COURT: Yeah, that sounds like it would  
4 probably be right.

5 MR. GOLD: -- even for the two locations, I think  
6 the aggregate would be four witnesses.

7 THE COURT: Okay.

8 MR. GOLD: Okay? So, if we may, we'll continue to  
9 work with Ms. Lee. She's targeted -- the first of the dates  
10 is October 10th.

11 THE COURT: Okay.

12 MR. GOLD: I'll probably firm that up, maybe as  
13 soon as this afternoon, just checking with one or two final  
14 witnesses now.

15 THE COURT: Okay.

16 MR. GOLD: Okay.

17 THE COURT: You have anything to add,  
18 Ms. Albanese, or ...

19 MS. ALBANESE: No, your Honor. Thank you.

20 THE COURT: Okay.

21 MS. ALBANESE: I just wanted to mention that we  
22 appreciate your Honor affording us time tomorrow --

23 THE COURT: Okay.

24 MS. ALBANESE: -- for the Mall of America matter.

25 THE COURT: Sure.

1 MS. ALBANESE: And we'll be ready to jump into the  
2 evidentiary.

3 THE COURT: Okay. And we have everything on that  
4 now, including the redacted stuff?

5 MS. ALBANESE: You have everything from our  
6 perspective --

7 THE COURT: Okay.

8 MS. ALBANESE: -- and even though there's a ton of  
9 paper, we don't contemplate that it will take more than two  
10 hours.

11 THE COURT: Okay. All right. Very well. Thank  
12 you.

13 MS. ALBANESE: Thank you.

14 MR. GOLD: Thank you, your Honor.

15 MS. MARCUS: Your Honor, since we've dealt with  
16 number three already, the next item on the agenda number  
17 four --

18 THE COURT: Right.

19 MS. MARCUS: The notice of assignment of the  
20 debtors filed on August 6, 2019, it's ECF No. 4763 -- excuse  
21 me; Jacqueline Marcus again, for the record, for the  
22 debtors.

23 THE COURT: Okay. And this is the Soto--

24 MS. MARCUS: That's correct.

25 THE COURT: -- Associates and Fruitland Avenue

1 warehouse and parking lot notice, right?

2 MS. MARCUS: Exactly, your Honor.

3 THE COURT: Okay.

4 MS. MARCUS: So the lease is to be sold to  
5 Mr. Shahery under the assignment agreement, to include a  
6 master lease and related sublease, for, as you noted, two  
7 parcels; the warehouse and the parking lot. The landlords  
8 for the two properties are different, and as reflected on  
9 the agenda, they've each objected to the proposed assignment  
10 on the basis that they haven't been provided with adequate  
11 assurance of future performance.

12 I wanted to take a moment to explain why we're  
13 here today discussing assignment of two leases that already  
14 have been assumed by the debtors. Because the 365(d)(4)  
15 deadline was looming and the Vernon leases clearly had  
16 value, the debtors decided back in May to assume the leases,  
17 even though at that time they didn't have a buyer in hand  
18 for the property. The court approved the assumption by  
19 order dated April 23rd; that's ECF No. 3314. The assumption  
20 order laid out a procedure that would apply if the debtors  
21 later sought to assign the Vernon leases, and the notice of  
22 assignment was filed pursuant to that assumption order.

23 Over the course of the past several weeks since we  
24 filed the notice, Mr. Shahery has provided both landlords  
25 with a substantial amount of information about his

1       wherewithal to satisfy the obligations under the leases, and  
2       the debtors and Mr. Shahery's attorneys have responded to  
3       numerous inquiries requiring -- regarding Mr. Shahery's  
4       performance of his obligations under the two subleases, and  
5       his intentions going forward.

6               Most importantly, Mr. Shahery has agreed to  
7       provide additional adequate assurance to the two landlords,  
8       and because the leases are different, the proposals are  
9       different. For the warehouse landlord, 5525 South Soto  
10      Street associates, he's offered to provide an irrevocable  
11      letter of credit from Comerica Bank in the amount of  
12      \$700,000, which is sufficient to cover the tenant  
13      obligations for rent and real estate taxes for a 12-month  
14      period, and that would be renewable every 12 months.

15             For the parking lot landlord, 51st Street  
16      financial -- excuse me -- 51st Street Fruitland Avenue, LLC,  
17      he's offered to provide a deposit in the amount of 12  
18      month's rent under the lease, or \$8400. And notably, your  
19      Honor, I think it bears emphasizing that the lease  
20      obligations for the parking lot are \$700 a month.

21             Together with the reply in support of the notice  
22      of assignment, the debtors filed the notice, the declaration  
23      of William Gallagher, a managing director of M-III Partners,  
24      LP, the debtor's financial adviser. Mr. Gallagher has been  
25      primarily responsible for real estate related issues during

1 these cases. Copies of the adequate assurance information  
2 provided by Mr. Shahery are attached to Mr. Gallagher's  
3 information. And subsequent to the filing of the Gallagher  
4 declaration, Mr. Shahery provided both landlords with  
5 another letter from Deutsche Bank, which reflects additional  
6 assets of \$11 million.

7 We also filed yesterday a declaration that  
8 attaches several of the letters as well as his views as to  
9 why he's more than able to perform the obligations under the  
10 leases.

11 The debtors believe, your Honor, that the security  
12 offered by Mr. Shahery, together with his record of timely  
13 payments since he took possession of the premises in August  
14 of 2018 and the below market nature of the master leases all  
15 lead to the conclusion that both landlords have been  
16 provided with adequate assurance of future performance, and  
17 that's without even taking into account Mr. Shahery's  
18 substantial liquid assets.

19 Your Honor, the debtors and Mr. Shahery have spent  
20 a lot of time and money over the past weeks trying to  
21 demonstrate that the landlords have adequate assurance. The  
22 response to the landlords each time was they want more and  
23 more and more. And what we think is going on here is that  
24 the landlords are trying to defeat the debtor's assignment  
25 of the leases because the market value for the premises

1 exceeds the rent provided under the master leases.

2           Rather than allowing the debtors to benefit on the  
3 arbitrage between the rental rate and the market value, the  
4 landlords are trying to defeat the assignment and  
5 appropriate that value for themselves, but the case law  
6 makes it abundantly clear that that's not permitted. As far  
7 as back as 1980, shortly after the enactment of the  
8 bankruptcy code, Judge Goetz noted in re Sapolin Paints,  
9 Inc., 5 B.R. 412 (Bankr. E.D.N.Y. 1980), "Landlord's fear is  
10 not realistic. He's seeking to use the legislative concern  
11 that landlords be fully protected to bring about precisely  
12 the kind of windfall that the statute was intended to  
13 prevent." And we think the same is true here, your Honor.

14           The debtors request that the Court overrule the  
15 objections and approve the assignment to Mr. Shahery.

16           THE COURT: Okay.

17           MR. SILVERSTEIN: Good morning, your Honor. Paul  
18 Silverstein, Hunton Andrews Kurth, for Henry Shahery.

19           THE COURT: Good morning.

20           MR. SILVERSTEIN: Good morning. On the phone, I  
21 believe, is Henry Shahery, and his counsel and my co-  
22 counsel, Saul Reiss; they're both calling in from Los  
23 Angeles.

24           THE COURT: Okay.

25           MR. SILVERSTEIN: They may have something to add

1 at some point. This should be a very simple matter, as it  
2 involves assignments of assumed leases. Everything  
3 Ms. Marcus said is correct. In April, the court authorized  
4 the debtors to assume two leases; a warehouse lease and a  
5 parking lot lease. The assumption order provides that the  
6 debtors could assign these leases and would file a notice of  
7 assignment. Mr. Shahery is paying the debtors \$5.25 million  
8 on assignment.

9 THE COURT: He wasn't the subtenant?

10 MR. SILVERSTEIN: He is the existing subtenant.

11 THE COURT: That's right.

12 MR. SILVERSTEIN: He is.

13 THE COURT: He is -- he was and is the subtenant.

14 MR. SILVERSTEIN: Correct. Under the warehouse  
15 lease, the debtor pays the lessor \$59,000 a month; my client  
16 pays the debtor \$160,000. Under the parking lot lease, the  
17 debtor pays the lessor \$700 per month -- which I don't think  
18 you can get a parking spot in Manhattan for \$700 a month --  
19 but my client pays the debtor \$4,000 a month. And, then, my  
20 client has paid all required rents and other shortages under  
21 the leases.

22 For adequate assurance, as Ms. Marcus said, we've  
23 offered a letter of credit for one year's rent on the  
24 warehouse lease -- that's \$700,000. We've offered --

25 THE COURT: I'm sorry; you did something.



1 MR. SILVERSTEIN: I did something?

2 THE COURT: No, no. You did something just to  
3 make the sound stop. I don't know what it was, but you did  
4 it.

5 UNKNOWN SPEAKER: It keeps -- it's getting  
6 feedback from --

7 THE COURT: From something up above?

8 UNKNOWN SPEAKER: -- over there. It keeps ...

9 THE COURT: Okay. All right.

10 UNKNOWN SPEAKER: -- move a little bit closer, it  
11 could ...

12 THE COURT: Yeah. I don't mind Counsel coming  
13 closer. That's fine.

14 MR. SILVERSTEIN: Can I follow you and walk?

15 UNKNOWN SPEAKER: Yeah; 'cause it's just that we  
16 keep getting feedback from up there. I apologize. Thanks  
17 for walking.

18 MR. SILVERSTEIN: We should be -- that's fine.  
19 So we've offered the \$700,000 letter of credit and the \$8400  
20 deposit -- I think it's the deposit or letter -- deposit.  
21 That's more than enough. And I think the case law cited in  
22 Marcus' pleading basically said that the facts that it's a  
23 below-market lease in and of itself is evidence that there's  
24 adequate assurance. More of -- I don't know if your Honor  
25 had a chance to read the declaration we filed yesterday?

1 THE COURT: I did.

2 MR. SILVERSTEIN: You did. Okay. And, look --  
3 Mr. Shahery is a very wealthy individual who has in this  
4 declaration shown two sources of assets; roughly \$30 million  
5 on deposit in cash at two banks with \$20 million lines of  
6 credit in both of those two banks. He's also stated he has  
7 no debt -- I think he has a mortgage on a house in Beverly  
8 Hills -- but no unsecured debt, no liabilities, owns  
9 substantial real estate holdings.

10 He can certainly confirm to your Honor that his  
11 declaration is true and what he says is true, and to drag  
12 him out from Los Angeles to New York to testify to that  
13 seems a little bit absurd to me, but, you know, your Honor  
14 will deal with that how your Honor sees fit.

15 The objections are really disingenuous. The  
16 warehouse lessor seems to want to change or modify the  
17 lease, which is just not on the table. Mr. Shahery will  
18 step into the shoes of the debtor, and he'll be subject to  
19 the rights and the obligations and the liabilities that  
20 exist presently under the lease; he'll step right into the  
21 debtor's shoes.

22 The parking lot lessor, among other things -- and  
23 by the way, backing up. The warehouse lessor's objections,  
24 it's a one liner; it says, "We object." It says nothing.  
25 The parking lot lessors -- the \$700 a month parking lot

1 lessor's objection raises for the first time that there  
2 might be environmental problems on this parking lot. The  
3 debtor used to own that parking lot. The debtor sold it to  
4 the parking lot lessor -- this is, like, over a 50-, 60-year  
5 period; never has there been in a suggestion by anyone in  
6 history of that parking lot that there's been environmental  
7 issues. But, in any event, Mr. Shahery still assumes the  
8 obligations under the lease as the lease is written.

9 So it just seems like this is a little over the  
10 top to even be arguing about adequate assurance given the  
11 circumstances. If your Honor has a view that the \$30  
12 million in cash and the \$20 million in letter of credit in  
13 two banks alone -- there are other banks where Mr. Shahery  
14 has money, okay? There are other assets that he has, but he  
15 doesn't believe that it's necessary for him to basically  
16 say, "I own this, I own this, I own that." It's typically  
17 not done in this type of situation like that. But my  
18 suggestion is that if your Honor would like to hear from  
19 Mr. Shahery and ask him if what he said is his declaration  
20 is true, you might do that. We've done that before, I  
21 think. I remember --

22 THE COURT: Well, why don't we just wait a minute.

23 MR. SILVERSTEIN: Okay.

24 THE COURT: I'll hear what the landlord --

25 MR. SILVERSTEIN: Give it --

1 THE COURT: -- has to say.

2 MR. SILVERSTEIN: But apropos to that type of  
3 testimony, I will tell you that I've done that before in --  
4 before Judge Wizmur in Camden when Hilton was buying Bally  
5 Reno and we had Hilton on the phone. Your Honor was in a  
6 case with me -- I think Presidio Oil -- where Don Evans, if  
7 you remember, the Commerce Secretary under George W. --

8 THE COURT: The guy who called everyone "buddy".

9 MR. SILVERSTEIN: Yes, the guy who called everyone  
10 buddy. Exactly.

11 THE COURT: Okay.

12 MR. SILVERSTEIN: Was also put on the phone --

13 THE COURT: I think he called me Judge Buddy at  
14 one point.

15 MR. SILVERSTEIN: On the phone when the Judge was  
16 asking questions about his financial wherewithal. But, yes,  
17 he did call everyone buddy. Yes. Your memory is just --

18 THE COURT: Okay. All right. Well, let's hold  
19 off on telephonic testimony for a second.

20 MR. SILVERSTEIN: Thank you.

21 THE COURT: I'll hear from the landlord's Counsel  
22 first.

23 MR. TAXIN: Thank you, your Honor. David R. Taxin  
24 of Dahan and Nowick --

25 THE COURT: Right.

1 MR. TAXIN: -- Counsel for the warehouse lessor.

2 My client has owned the property and ground leased it to  
3 Sears for the last 50 years; the lease is from 1947.

4 My client generally leases to large retailers or  
5 investors throughout the United States. Mr. Shahery is a  
6 very small, private company. Sears was the largest retailer  
7 in the United States. Preliminarily, my client was advised  
8 by a specific debtor in the process that it had bid two and  
9 a quarter million dollars more than Mr. Shahery had bid, and  
10 that that bidder is, in fact, backed by one of the largest  
11 pension funds in the United States, having tens of billions  
12 of dollars. So my first question -- and I had raised this  
13 to Sears' counsel, is why are we here at this particular  
14 stage if someone had come in and offered two and a quarter  
15 million dollars more for their bid? And that entity is  
16 obviously extremely qualified financially.

17 THE COURT: Okay. Well, that wasn't a basis to  
18 the objection, but this is a motion for leave to assign. So  
19 were there higher and better offers for the property?

20 MR. TAXIN: Your Honor, there was another  
21 discussion from another institution that indicated on a  
22 preliminary basis that they were willing to pay more. But  
23 that offer was subject to a 60-day due diligence, and the  
24 concern on our part was that there was a roof that needs  
25 substantial repair, and that once due diligence was

1 completed, that offer would be reduced by the amount of the  
2 repair. And, in addition, that offer was contingent upon  
3 the other entity buying the property from the landlord and  
4 we didn't know whether that was likely at all.

5 THE COURT: Okay. All right.

6 MR. TAXIN: I didn't know anything about the other  
7 entity buying the property as part of the offer, but my  
8 client was aware and actually spoke to the party who made  
9 the offer, who called them at the property. So my -- I  
10 don't --

11 THE COURT: Apparently he made an offer to buy the  
12 property, though, at that time?

13 MR. TAXIN: No, he didn't offer to buy the --

14 THE COURT: Okay. All right.

15 MR. TAXIN: -- property, but I don't think 60 days  
16 is that long a period of time for due diligence, for a two  
17 and a quarter million dollar differential.

18 THE COURT: No, it's just -- it's more the concern  
19 of what they find.

20 MR. TAXIN: Well, what if they -- if they found  
21 something is nothing to say that they wouldn't have  
22 continued with their offer. But rather than taking that --

23 THE COURT: Well, nothing to say that they would  
24 have.

25 MR. TAXIN: No. We don't -- no one can say --

1 THE COURT: Right.

2 MR. TAXIN: With any degree of guarantee whether  
3 or not they would have, but --

4 THE COURT: Okay.

5 MR. TAXIN: -- I, to be honest, I feel that is an  
6 offer that should be considered, or should have been  
7 considered, or should still be considered by Sears. With  
8 regard to the current offer in terms of adequate assurance,  
9 we didn't file any more specific objections with this Court,  
10 but would do so prior to an evidentiary hearing, but we did  
11 make Sears aware on a regular basis of what some of our  
12 concerns were. We sent a number of e-mails to Sears and  
13 Mr. Shahery containing questions as to the financial  
14 circumstances, we've asked for financial statements.

15 Now, if Mr. Shahery has lines of credit at a  
16 bank -- which he does, presumably has submitted financial  
17 statements to the bank. All we have, basically, are  
18 one-line letters from banks saying it's has "X" number of  
19 dollars in the bank, but we don't know what his other  
20 commitments are -- what his business commitments are. So we  
21 asked for that.

22 I take issue with the fact that we didn't agree to  
23 maintain the confidentiality of those records. They were  
24 very limited exceptions, which we noted to Sears, but we  
25 never heard back, other than to say that Mr. Shahery didn't

1 feel that he was required to provide any further financial  
2 information because what he showed was enough. So we don't  
3 feel that is, and we're asking for financial statements.

4 There were some other issues that came up in that  
5 Sears had indicated in their notice that the assignee was  
6 Mr. Shahery, but, in fact, the contract -- which wasn't even  
7 sent to us along with the notice -- we had to ask for the  
8 contract -- was to Mr. Shahery or assignee. So we raised  
9 with Sears our objection to the fact that if Mr. Shahery  
10 were to take it through an assignee, then that would leave  
11 us exposed. Mr. Shahery, as I understand, has agreed to  
12 take this personally, which is the way that he has it  
13 subleased from Sears. So that -- assuming that that's still  
14 the case and still a fact, would resolve that portion of the  
15 objection, which we filed.

16 The other major part of this is the roof, and  
17 Sears as the landlord to Mr. Shahery has the obligation to  
18 repair and/or replace of roof. Sears and Mr. Shahery, I  
19 believe, have each agreed that the roof needs to be  
20 replaced, not simply repaired, and the lowest estimate that  
21 we saw when we asked for Sears to the documents, was two and  
22 a half million dollars. So part of what we asked for from  
23 Mr. Shahery in connection with the objections, which we  
24 noted to Sears, was either some kind of construction escrow  
25 so that we'll know that when Mr. Shahery's lease it up,



1 we're going to get the premises back in good and tenantable  
2 condition, rather than with a roof that's leaking, et  
3 cetera, and/or a letter of credit that would provide, say,  
4 for two and a half million dollars to assure that he would  
5 do the roof work that was necessary for the premises, so  
6 that when we ultimately get the premises back in three,  
7 five, or -- three, eight, or thirteen years, that we would  
8 have a roof that works.

9 THE COURT: What is the remaining term of the  
10 lease?

11 MR. TAXIN: The remaining term is three years, but  
12 there's two five-year options on it. So it goes to around  
13 April 2022 and then there's two five-year options; first to  
14 '27 and to '32. So those were some of the issues which we  
15 posed.

16 THE COURT: Well, are there any other ones?

17 MR. TAXIN: Pardon me?

18 THE COURT: Are there any other ones?

19 MR. TAXIN: Those -- the lack of financial  
20 documentation, which we feel is necessary, the fact that  
21 there was a higher offer, which we believe should be  
22 explored, the fact that he should be on the lease  
23 personally, and the security for the \$700,000 plus  
24 undertakings regarding the roof were certain of the issues.  
25 We obviously need to know that there's insurance insuring

1 the landlord, the owner of the property, that presumably we  
2 would have prior to the time that they had a closing. So --

3 THE COURT: Is that a requirement in the lease?

4 MR. TAXIN: Yes. They have to insure the  
5 property.

6 THE COURT: Okay. Okay.

7 MR. TAXIN: Sears currently insures the property  
8 and has general liability naming the landlord the owner of  
9 the property. So those are some of the issues and -- that  
10 we were --

11 THE COURT: Had you raised the insurance issue  
12 before just now?

13 MR. TAXIN: I don't know that I raised this with  
14 Sears. I was --

15 THE COURT: Raise it with anybody?

16 MR. TAXIN: -- raising -- I raised it with my  
17 client and we were --

18 THE COURT: All right. So I'm going to disregard  
19 that.

20 MR. TAXIN: -- working -- no, we were working --

21 THE COURT: Look, this is not a moving target,  
22 sir. Give me a break.

23 MR. TAXIN: No, no. But we were working on a  
24 possible --

25 THE COURT: Look, if you're concerned about

1 insurance, you raise the issue. I literally have a one-page  
2 objection dated August 13th --

3 MR. TAXIN: Yes, you do.

4 THE COURT: -- and it just says, "The debtors have  
5 failed to provide adequately assurance of future  
6 performance."

7 MR. TAXIN: Well, because they hadn't. They just  
8 provided a one-line typed letter.

9 THE COURT: But you've got to say what it is.

10 MR. TAXIN: I told Sears what it is.

11 THE COURT: Not the insurance. So then I'm not  
12 going to consider that issue.

13 MR. TAXIN: Well, there has to be an issue that  
14 they have to cover us under the lease if they're going to  
15 take assignment of the lease.

16 THE COURT: But you've given no indication that  
17 that's not going to happen.

18 MR. TAXIN: No, I don't know whether or not that  
19 will happen. I don't even know --

20 THE COURT: All right. So I don't take -- I  
21 don't -- no objections.

22 MR. TAXIN: No. There are some of the other  
23 issues which I have raised which I am raising with you --

24 THE COURT: All right. --

25 MR. TAXIN: -- which I've raised with Sears

1 progressively over the last several days.

2 THE COURT: All right. This is not an iterative  
3 process; it comes to an end --

4 MR. TAXIN: No, I understand, and I've raised --

5 THE COURT: -- and it's come to an end today.

6 MR. TAXIN: -- I've raised issues with Sears.

7 What I'm asking --

8 THE COURT: No; but are there any others?

9 MR. TAXIN: These are the issues that I've raised.

10 THE COURT: Okay. Okay. All right.

11 MR. TAXIN: I'm asking for a hearing on these  
12 issues.

13 THE COURT: Well, you haven't raised the insurance  
14 issue with Sears until this very moment. What is Mr.  
15 Shahery paying for this lease?

16 MR. TAXIN: For the lease to my client?

17 THE COURT: Yeah.

18 MR. TAXIN: Well, Sears is paying the -- what is  
19 he paying Sears?

20 MS. MARCUS: \$5.2 million for the two leases.

21 THE COURT: \$5.2 million for the two leases.

22 MR. TAXIN: For the two leases.

23 THE COURT: And what is the estimated cost of  
24 repair on the roof?

25 MS. MARCUS: Your Honor, I would like to address

1 the roof issue, if I may. I --

2 THE COURT: Okay. All right. I just want to go  
3 back to what the landlord believes the estimated cost of  
4 repair on the roof is.

5 MR. TAXIN: Sears told us that minimum costs was  
6 two and a half million dollars. They sent us documents;  
7 they're probably in the papers that Mr. Gallagher presented.

8 MR. SILVERSTEIN: Your Honor, can I interject on  
9 that issue?

10 THE COURT: Okay. No, no, no. I just want to --  
11 yes. Both of you can respond, but I --

12 MR. SILVERSTEIN: But on that specific issue?

13 THE COURT: Well, I just want -- are you -- you  
14 have anything more on this?

15 MR. TAXIN: No.

16 THE COURT: Okay. All right. So now I'll hear --

17 MR. SILVERSTEIN: First I'm going to lead on the  
18 roof, if I may.

19 THE COURT: Okay. All right.

20 MR. SILVERSTEIN: My understanding -- and Mr.  
21 Reiss may want to jump in -- my understanding is that there  
22 were various discussions between Sears and Mr. Shahery with  
23 respect to repairs of the roof which Sears was obligated to  
24 do. They were getting various estimates back and forth.  
25 And there are various things that need to be done to the

1 roof which the lessee under the client lease is obligated to  
2 do.

3 Mr. Shahery will be obligated to do that; that  
4 will be his obligation. Whether it costs, you know, X-  
5 dollars or Y-dollars or two X-dollars or two XY-dollars, it  
6 doesn't matter; he's going to have to do what's necessary to  
7 be done to be in compliance with the lease. The --

8 THE COURT: But he doesn't have an estimate at  
9 this point?

10 MR. SILVERSTEIN: There are various estimates for  
11 different things. The question is, does it need a new roof,  
12 does it need to be repaired? I don't know the details. Mr.  
13 Reiss may want to be heard, and I know Ms. Marcus wants to  
14 be heard first.

15 MS. MARCUS: If I may go first?

16 MR. SILVERSTEIN: Please. I'm sorry.

17 THE COURT: Okay.

18 MS. MARCUS: Your Honor, starting with the roof  
19 issue, I think that Mr. Taxin may have overstated where we  
20 are on the roof and, basically, the debtor did go out and  
21 obtain estimates for what it would cost to replace the roof.

22 THE COURT: Okay.

23 MS. MARCUS: The lease requires -- my  
24 understanding is the lease requires that the roof be  
25 maintained; it doesn't require the roof to be replaced. So

1 as the assignee of the lease, Mr. Shahery would have to  
2 comply with the terms of the lease -- all of terms of the  
3 lease -- including maintaining the roof. If he determines  
4 that repair is more appropriate than replacement, then  
5 that's his prerogative and he and the already can fight  
6 about that as to what the lease requires.

7 THE COURT: Is it fair to say that what the  
8 landlord's Counsel said as far as the estimate to repair was  
9 accurate to -- not repair; replace -- two and a half  
10 million?

11 MS. MARCUS: Yes, that's accurate information; it  
12 did come from the debtors.

13 THE COURT: All right. And I'm assuming that's  
14 the outside cost because replacing is generally more  
15 expensive than repairing.

16 MS. MARCUS: That's right, your Honor. And a  
17 substantial investment has already been made by Mr. Shahery  
18 in making repairs; he paid one million two at the inception  
19 of the lease that was used by Sears to make certain repairs  
20 to the property, and there was also \$800,000 more that was  
21 spent over the course of the past year.

22 MR. SILVERSTEIN: \$2 million.

23 THE COURT: How long has he been the subtenant?

24 MS. MARCUS: He signed the lease in December of  
25 2017 and posted the \$1.2 million deposit, but the work was

1 then done between January and August, and he actually took  
2 possession --

3 THE COURT: And is he using the warehouse? He's  
4 not just warehousing the warehouse; he's using it?

5 MR. SILVERSTEIN: Yes.

6 MS. MARCUS: Yes, yes, your Honor.

7 MR. TAXIN: He's using the warehouse.

8 MS. MARCUS: Yes, your Honor.

9 THE COURT: Okay. All right.

10 MR. SILVERSTEIN: And landlord will do whatever  
11 necessary to maintain the roof as required under the lease.

12 THE COURT: Right. Okay. All right.

13 MS. MARCUS: If I may address the other issues --

14 THE COURT: Okay.

15 MS. MARCUS: -- raised by Mr. Taxin? With respect  
16 to insurance, I know you don't want to hear about it, but  
17 Mr. Shahery has provided a certificate of insurance.

18 THE COURT: All right.

19 MS. MARCUS: There's some question about whose  
20 name it's in, but there is insurance, and there will be  
21 insurance, and he'll comply with his obligations under the  
22 lease.

23 With respect to whether he is --

24 THE COURT: And will that include -- does the  
25 lease require the landlord be a named insurer, or --



1 MS. MARCUS: Yes, it does.

2 THE COURT: Okay. All right.

3 MS. MARCUS: And that is the -- the certificate  
4 does have the landlord as a named insured --

5 THE COURT: Okay.

6 MS. MARCUS: -- for the two properties. With  
7 respect to the issue about whether the assignee would be  
8 Mr. Shahery or an assignment, the lease fail -- assignee,  
9 excuse me -- the lease fail agreement does give him that  
10 option, but he has agreed in the context of these  
11 discussions to waive the ability to have somebody else take  
12 an assignment. And if your Honor wants your order to say  
13 that it must be him personally, we're fine with that, and I  
14 think Mr. Shahery is fine with that.

15 MR. SILVERSTEIN: Mr. Shahery is fine with that  
16 also, your Honor.

17 THE COURT: Okay.

18 MS. MARCUS: Getting back to the issue of the  
19 competing bid, I have a couple of responses. I already  
20 advised the court that the debtors were concerned about the  
21 due diligence period and whether the deal -- the alleged  
22 other deal -- would ever come to fruition. But in addition  
23 to that, the land -- it's not really the landlord's  
24 prerogative to say there's somebody better out there who I  
25 would rather have as my tenant.

1 THE COURT: That's a different issue, the "rather  
2 have"; I agree with you. The only issue is whether it's an  
3 exercise of good business judgment to assign the lease for  
4 this price.

5 MS. MARCUS: Exactly right. And the debtor has  
6 thought about it, the debtor consulted with the  
7 professionals for the unsecured creditors committee, the  
8 real estate advisers as well, and they concluded  
9 collectively that selling the property to Mr. Shahery was a  
10 good business decision.

11 THE COURT: You're representing that the  
12 alternative offer was contingent in addition on the landlord  
13 selling the property? Why would they buy the lease if the  
14 landlord was going to sell the property?

15 MS. MARCUS: I'm looking at -- Mr. Gallagher would  
16 have more information. But my understanding was that they  
17 wanted to do a major redevelopment of the site. I'm not  
18 sure, frankly, because we never got that far, but there were  
19 a number of conditions, which created a concern on the  
20 debtor's part.

21 THE COURT: So it may not have been a sale of the  
22 property, then; it may have been a modification of the lease  
23 to enable those things to happen?

24 MS. MARCUS: May I have a minute, your Honor?

25 THE COURT: You want to talk to your client?

1 MR. TAXIN: Your Honor, if I may --

2 THE COURT: Let me just -- just wait a second.

3 MS. MARCUS: I'm going to modify my testimony a  
4 little bit, your Honor. We believe, based on conversations  
5 with our broker, that the competing bidder was making the  
6 offer on the lease because they ultimately wanted to buy the  
7 property. I'm not even sure there was a written offer, but  
8 our understanding was that that's what they were trying to  
9 orchestrate, and that's what led to the concern. I don't  
10 think there was anything specifically that said it was  
11 contingent upon purchasing the property.

12 THE COURT: Okay.

13 MS. MARCUS: But, your Honor, just in conclusion,  
14 you know, the contingent nature and having the due diligence  
15 out, in effect, was the biggest concern for the debtors.

16 THE COURT: And what was the proposal?

17 MS. MARCUS: It was a 60-day period.

18 THE COURT: No, I'm sorry; what was the stated  
19 proposal subject to the conditions?

20 MS. MARCUS: I think it was approximately --

21 MR. SILVERSTEIN: Seven and a half.

22 MS. MARCUS: -- Seven and a half million dollars.

23 THE COURT: So two million more.

24 MS. MARCUS: A little over two million more.

25 THE COURT: Okay. Okay. All right. Anything

1 more?

2 MR. GRUMER: Yes, your Honor. Carl Grumer --

3 THE COURT: Okay. Go ahead.

4 MR. GRUMER: -- I'm sorry.

5 THE COURT: On the phone? You can go ahead.

6 MR. GRUMER: Carl Grumer -- sorry, Carl Grumer for  
7 51st Fruitland Avenue; that's the parking lot landlord. And  
8 I wanted to address what was in our papers and what was in  
9 the reply papers. There were a number of misapprehensions  
10 going on here.

11 THE COURT: Can I interrupt --

12 MR. GRUMER: First of all, we --

13 THE COURT: I'm sorry, Mr. Grumer; can I interrupt  
14 you for a second?

15 MR. GRUMER: Sure.

16 THE COURT: I wanted to finish up with the  
17 main -- warehouse lease first. So give Counsel --

18 MR. GRUMER: Okay. I'm sorry.

19 THE COURT: -- for the warehouse landlord the  
20 opportunity to close on that, and then we'll turn to the  
21 parking lot.

22 MR. TAXIN: Well, only this --

23 MR. GRUMER: Okay. I'm sorry, your Honor.

24 MR. TAXIN: -- your Honor, only this, that upon  
25 expiration of the lease, we're supposed to receive the

1 property back in good condition, and we want to be assured  
2 that if Mr. Shahery has this assignment, that when his lease  
3 ultimately is up, we're going to be getting it back in good  
4 condition. And that doesn't mean that the roof, which is  
5 about, maybe 50 or 75 years old possibly now, will just  
6 patched. So that's why Sears and he both were looking at  
7 and agreeing to the replacement idea. Thank you.

8 THE COURT: All right. So now let's turn to the  
9 parking lot. Mr. Grumer?

10 MR. GRUMER: Thank you, your Honor. First of all,  
11 there was a statement made that we just kept asking for more  
12 and more and more information; that is not accurate. We  
13 have been receiving more and more information, but never the  
14 information that we requested, which was very simple; the  
15 financial statements. A balance sheet, a profit and loss,  
16 cash flow, to show what the cash needs of the debtor, the  
17 size of his operations, what the proportion of -- access to  
18 cash they have is related to their cash needs; pretty, you  
19 know, garden variety standard stuff on a lease assignment.  
20 We have not gotten that.

21 There is an implication, maybe even a statement,  
22 in Mr. Shahery's declaration that the "objector's attorney,"  
23 "objector's counsel" -- I'm not sure which objector --  
24 refused to sign a -- some kind of nondisclosure agreement,  
25 although the declaration is just a little vague in that

1 regard. That never happened. Nobody ever brought up that  
2 subject.

3 We asked for a financial statement and we were  
4 told we weren't going to get one. Nowhere did anybody offer  
5 to give us one if they were a nondisclosure agreement, we  
6 would be willing to enter into an nondisclosure agreement,  
7 to obtain a financial statement, which is what we've been  
8 asking for all along and have not been getting. We think  
9 that's fairly standard and we should entitled to just get  
10 the entire financial picture to determine the assignee's  
11 ability to perform under the lease.

12 And this has been focusing on the amount of the  
13 rent; that's not the issue here. The amount much the rent  
14 is modest -- \$750 per month. What's the bigger issue here  
15 is the indemnities, under the lease, which includes  
16 indemnities, not only for personal injury, but for  
17 environmentally issues that might arise.

18 And one problem here is we don't know what purpose  
19 the property is going to be put after the assignment. The  
20 lease that we have attached has a, what purports to be a use  
21 clause, but the use clause just basically allows any lawful  
22 use. So the assignee could be doing just about anything  
23 with the property or with the adjacent warehouse, which I  
24 understand has a similar provision, and it could cause  
25 environmental issues now or two years from now or five years

1 now; we don't know. And that could be a substantial number.

2 And we just want to get a handle on what the  
3 finances are, not only what, you know, assets there might be  
4 but what debt there might be; obviously that's a major issue  
5 in terms of any assignees financial condition.

6 There's also an issue as to the insurance which we  
7 did raise with the debtor. And we received initially  
8 some -- well, we received five -- a total of five  
9 certificates of insurance, four of which, the named  
10 insurance is Sears. Why we got those, I'm not even sure,  
11 because, obviously, if there were to be an assignment, Sears  
12 would be out of the picture.

13 And the fifth one, the insured was a company  
14 called Shason, Inc., S-H-A-S-O-N, not Mr. Shahery, and the  
15 landlord was named as an additional insured, for claims  
16 arising out of the operation by the named insured. Well,  
17 first the named insured was Shason, who is not going to have  
18 any operations at the property, so that certificate is of no  
19 value because it insures us for operations by some entity  
20 that's not going to operate the property.

21 Mr. Shahery's declaration said that they would  
22 give us a proper insurance certificate and we've been asking  
23 for one; we haven't gotten it. So that's something we, you  
24 know, we need, but most importantly, we really need a  
25 financial statement to evaluate the entire financial

1 picture. And we've asked for it, and had we'd been asked  
2 for a nondisclosure agreement, we'd have been agreeable, and  
3 I'm telling everybody now that we would be agreeable, but we  
4 were never asked. And we think we're entitled to that and  
5 we will give the debtor the protection -- excuse me, the  
6 assignee -- the problems it needs, but we simply want the  
7 basic financial information that any landlord would ask for  
8 in connection with an assignment.

9 MS. MARCUS: Jacqueline Marcus again, your Honor.  
10 With respect to the nondisclosure agreement -- okay, I won't  
11 even go there.

12 THE COURT: I don't -- look, as far as the  
13 nondisclosure agreement is concerned, I think for purpose of  
14 this hearing, it's irrelevant.

15 MR. FAIL: With respect to the financial  
16 statement, I think what's a difference here -- and I would  
17 concede that normally you would get a financial statement  
18 before from an entity that is the assignee, and normally you  
19 want to do that to make sure that the entity is not an empty  
20 shell and has the wherewithal to meet the obligations under  
21 the lease. Here we have, I think, the unusual situation  
22 that Mr. Shahery personally is the assignee, and, therefore,  
23 his personal assets are at risk, and that ameliorates the  
24 financial statement issue.

25 With respect to Mr. Shahery's position on



1 providing more information about his liabilities, I'm going  
2 to turn that one to Mr. Silverstein because we've been  
3 trying to get that and his issue more than ours.

4 With respect to the use of the property, the  
5 property -- I believe we've confirmed that the property  
6 going forward -- it is a parking lot and it is going to be  
7 used as a parking lot and to the extent that it's necessary  
8 for the Court to reflect that in the proposed order, I think  
9 people would be fine with that; there no intent to change  
10 the use of the property. And I don't believe there's been  
11 an indemnification claim ever made or any personal property  
12 or personal liability insurance or environmental issues ever  
13 over the history of this lease, so I really think that  
14 that's a nonissue.

15 THE COURT: Okay.

16 MR. SILVERSTEIN: Thank you, your Honor. Paul  
17 Silverstein, for the record. Just to supplement, Mr.  
18 Shahery's declaration reflects what his liabilities are, and  
19 the answer is he has no unsecured debt and his only secured  
20 debt is a mortgage on his home in Beverly Hills. So I don't  
21 know what more there is to say. With \$30 million in cash in  
22 two banks and an aggregate in \$20 million in lines of credit  
23 from those two banks alone, -- and that's just -- that's not  
24 the whole thing; that's just a -- you know, two examples of  
25 how much he has in two banks. That should be more than

1 sufficient.

2 With respect to Shason, Inc., that's a wholly  
3 owned subsidiary that's a guarantor under the parking lot  
4 lease. The certificate of insurance or whatever will be  
5 changed to reflect him individually; that's fine. We  
6 offered to do that, and that's not an issue. So I don't  
7 think there are any issues.

8 And, again, with the parking lot lease, the debtor  
9 can correct me if I'm wrong, but my understanding is that  
10 the debtor used to own the parking lot lease, the debtor  
11 sold the parking lot lease to the current owner, and there's  
12 never been issues with respect to, you know, its use under  
13 the lease. Whatever the lease said --

14 THE COURT: Is Marcus right, that there's no  
15 intention to use it other than as a parking lot?

16 MR. SILVERSTEIN: That is my understanding, but  
17 Mr. Reiss and Mr. Shahery are both on the phone; if I'm  
18 incorrect, they should correct me. Gentlemen, are you  
19 there?

20 MR. REISS: Your Honor, this is Saul Reiss in Los  
21 Angeles with Mr. Henry Shahiri.

22 MR. SILVERSTEIN: Can you talk a little louder,  
23 Saul?

24 MR. REISS: Yes. I'm Counsel for Mr. Shahery.  
25 And this -- the parking lot is a parking lot. That's all

1 it's ever been, and it's all it ever will be.

2 THE COURT: Okay.

3 MR. SILVERSTEIN: Thank you, your Honor.

4 THE COURT: And Mr. Shahery is prepared to change  
5 the insured to him personally?

6 MR. SILVERSTEIN: Absolutely.

7 THE COURT: As the -- since he's now going to be  
8 the --

9 MR. SILVERSTEIN: Absolutely, without question.

10 THE COURT: -- the lessee?

11 MR. SILVERSTEIN: Yes. And you have been so  
12 provided, your Honor.

13 THE COURT: Okay.

14 MR. REISS: The reason Shason got the certificate,  
15 your Honor, was it in fact occupies all of the space on the  
16 warehouse and the parking lot and, therefore, it is the  
17 insured -- it is the operating company that business takes  
18 place there. Mr. Shahery owns all of it. It's a company  
19 that's been in existence for 101 years.

20 THE COURT: Okay. All right. Anything else?

21 MR. GRUMER: Well, your Honor, just in closing, we  
22 still would like to see the financial statements and verify  
23 the debt. You know, if nothing else, any debt to -- if  
24 there's any debt owing to the banks, for where there are  
25 deposits there would be, and, under California Law, bankers

1 write-off offset, so essentially they are secured -- a  
2 bankers lien. So whether Mr. Shahery knows or not, that  
3 would be certainly a secured debt.

4 And, of course, if those lines of credit are drawn  
5 down, every dollar that is drawn down is another dollar of  
6 debt, which would be secured.

7 So we still would like to see the financial  
8 statement. It's, as I said, it's fairly standard. And the  
9 reason why we shouldn't be able to, ask Mr. Shahery sort of  
10 indicated in his declaration, that with a proper  
11 nondisclosure agreement, he would be willing, so we would  
12 like to get that. But in addition, it sounds like we have  
13 heard three things here that would be in an order that would  
14 clarify matters, which is that the property will not be used  
15 as anything other than a parking lot, Mr. Shahery would  
16 waive any right to assign the lease or to the rights under  
17 the lease purchase agreement to any entity --

18 THE COURT: I didn't hear that, and I doubt he's  
19 saying that.

20 MR. GRUMER: -- and that the fifth -- pardon?

21 THE COURT: He is.

22 MS. MARCUS: It's under the lease purchase  
23 agreement he would waive, not the right to assign the  
24 lease --

25 THE COURT: Under the lease purchase agreement;

1 not the lease itself. I understand. Okay. Go ahead, sir.

2 MR. GRUMER: Right. No, the lease purchase  
3 agreement. And, third, that the certificate of insurance  
4 will be amended to list I guess, both Shason and  
5 Mr. Shahery, sounds like. But that certainly Mr. Shahery  
6 will be added as a named insured so that our rights as an  
7 additional insured would cover any operations by Mr.  
8 Shahery. But we still would like to see that financial  
9 statement so at least we can value it, and if it's as  
10 stunning as we are told, then it shouldn't be a problem.

11 MR. SILVERSTEIN: And, your Honor, Mr. Reiss or  
12 Mr. Shahery --

13 THE COURT: It doesn't need to be as stunning as  
14 their told under the case law for a lease of this nature.  
15 This is a total waste of time and money.

16 All right. I have before me a motion by one of  
17 the debtors in this case to assign its rights under two  
18 leases to Henry Shahery, their leases of contiguous property  
19 in Vernon, California.

20 One is a lease of a warehouse where the landlord  
21 is 5525 South Soto Street Associates, and the other is a  
22 lease of a parking lot where the landlord is 51st Fruitland  
23 Avenue, LLC. Each lease had previously been assumed by the  
24 debtor, and that decision was based on the debtor's belief  
25 that it was an exercise of good business judgment to do so,

1 even the debtor itself was going out of business, because  
2 the leases were favorable leases, that is they were valuable  
3 to the debtor; they were below market, in other words.

4 It now seeks to assign the lease under Section 365  
5 of the bankruptcy code to Mr. Shahery for five and a half?

6 MS. MARCUS: 5.2.

7 THE COURT: \$5,250,000, obviously, bearing out its  
8 view that the leases are indeed valuable and under market.

9 Mr. Shahery, or rather his business, currently is  
10 the subtenant under both of those property, and the  
11 subleases provide for payment of substantially more rent to  
12 the debtor than the debtor pays to the landlord or  
13 landlords. The bankruptcy code requires as a condition to  
14 the debtor's right to assign a lease, among other  
15 conditions, none of which are challenged here, that the  
16 assignee provide adequate assurance of future performance  
17 under the lease.

18 That term "adequate assurance of future  
19 performance" is not defined in the bankruptcy code, but the  
20 courts have taken a pragmatic approach on a fact based case  
21 by case analysis in determining whether the requirement has  
22 been met. It does not require an absolute guarantee of  
23 performance, but, rather, it must simply appear that the  
24 rent will be paid and other lease obligations met. The  
25 emphasis is on protection. In re M. Fine Lumber Co., Inc.,

1 383 B.R. 565, 572, 573 (Bankr. E.D.N.Y.) as well as in re  
2 Westview 74th Street Drug Corp., 59 B.R. 747, 754 (Bankr.  
3 S.D.N.Y. 1986). The primary focus is on the assurance that  
4 the landlord will be protected with respect to the payment  
5 of rent under the lease, in re Sanshoe Worldwide Corp. 139  
6 B.R. 585, 592 (S.D.N.Y. 1992), as well as the foregoing  
7 cases.

8 Although it's a fact-based inquiry, "to determine  
9 whether a landlord is adequately assured, courts look to a  
10 nonexclusive list of factors, including the debtor's payment  
11 history, or in this case this subtenant's payment history,  
12 the extent and history of default, presence of a guarantee  
13 and/or a security deposit, evidence of profitability, a plan  
14 with earmarked funds exclusively for the landlord, the  
15 general outlook of the debtor's industry, or, in this case,  
16 the assignee's industry, and whether the lease is at or  
17 below the prevailing market rate; Androse Associates of  
18 Allaire, LLC v. A&P, in re A&P 472 B.R. 666, 675 (S.D.N.Y.  
19 2012).

20 Here in each case, the foregoing factors and the  
21 general purpose and policy behind the adequate assurance  
22 condition to assignment of a lease under 2nd.365 of the  
23 bankruptcy code are satisfied. First, and perhaps most  
24 importantly, the two leases are significantly below market.  
25 That fact alone has been a primary consideration in a number

1 of cases supporting the determination that is adequate  
2 assurance in provided, namely, or logically, if a lease is  
3 substantially below market it's highly unlikely, even in the  
4 event of a default and termination of a lease that the  
5 landlord would be able to promptly re-let the lease, or re-  
6 let the property. See, for example, again in re M. Fine  
7 Lumber Co., Inc., 383 B.R. 565, 573 and in re General Oil  
8 Distributors, Inc., 18 B.R. 654, 658 (Bankr. E.D.N.Y. 1986).

9 Here the landlord is paying \$5.25 million to  
10 maintain the lease; that's far in excess of any lengthy  
11 period of rent under either lease in the event that the  
12 landlord finds itself in a default situation under either  
13 lease. Moreover, that amount is roughly double the outside  
14 amount necessary to deal with the roof issue, with respect  
15 to the warehouse, i.e., a full replacement of the roof as  
16 estimated and as asserted by the landlord would be  
17 approximately \$2.1 million.

18 In addition, Mr. Shahery has been the subtenant on  
19 these two properties for approximately two years, and has  
20 never missed any rental payments to the debtors,  
21 notwithstanding the fact that those rental payments are  
22 substantially larger than the rental payments that he would  
23 have to make to the landlord under either lease.

24 Finally, the landlord has agreed -- I'm sorry, the  
25 proposed assignee, Mr. Shahery, has agreed to post a letter



1 of credit for the benefit of the warehouse landlord and a  
2 deposit for the benefit of the parking lot landlord, in each  
3 case, for the amount of a full year's rent. Far lesser  
4 deposits have served as adequate assurance in other cases  
5 and it appears clear to me that such a deposit of a full  
6 year's rent in each case of a highly favorable lease to the  
7 tenant is almost overkill as adequate assurance. See in re  
8 Citrus Tower Boulevard Imaging Center, LLC Bankruptcy N.D.  
9 Georgia, 2012, Bankruptcy Lexus 2208, April 2, 2012 at page  
10 18 through 19 where six months' rent was offered, and in re  
11 Westview 74th Street Drug Corp., 59 B.R. 755, where two  
12 months' security deposit was offered, as well as in re  
13 Casual Male Corp., 120 B.R. 256, 264, where a six months'  
14 letter of credit was offered.

15 Given all of the foregoing, as well as the  
16 committees by the landlord on the record to change its  
17 insurance -- I'm sorry; I keep saying landlord -- committee  
18 by the assignee on the record to change the insurance policy  
19 to cover as an insured, not only the entity that's currently  
20 operating as the subtenant at the property, but the  
21 respective assignee who is the owner of that company, and  
22 the landlord's agreement -- I'm sorry, the assignee's  
23 agreement -- to be personally the tenant on the landlord --  
24 on the lease in each instance, therefore, I'm subjecting his  
25 own financial wherewithal directly.

1           And, finally, the prospective assignee's agreement  
2     to use the parking lot only as a parking lot. It appears to  
3     me that to the extent there were legitimate concerns --  
4     there were legitimate concerns that is raised by the  
5     prospective landlords as to the presence of an assignee  
6     other than Mr. Shahery directly, the potential use of the  
7     parking lot for the something else that might create  
8     environmental or other hazards, and the potential gap of  
9     insurance coverage have all been sufficiently addressed. I  
10    will note that it's fairly common in lease assignment cases  
11    for the assignee to be a special purpose or single purpose  
12    entity created for the purpose of taking the assignment;  
13    that is often not a bar to the assignment on the basis of a  
14    lack of adequate assurance if the principle of the assignee  
15    either has sufficient financial resources or sufficient  
16    experience of running the underlying business, as well as  
17    either a logical or personal commitment to do so in a way  
18    that does not subject that business to ruin, and thereby  
19    causing the special purpose entity to default on the lease,  
20    or where the lease itself is highly favorable. See, for  
21    example, in re Bygaph, Inc., 56 B.R. 596, (Bankr. S.D.N.Y.  
22    1986) at pages 605 through 606, and in re Casual Male Corp.,  
23    120 B.R., 256.

24           Given all of the foregoing, I believe it's not  
25    necessary to have an evidentiary hearing whereby Mr. Shahery

1 would be cross-examined on the accuracy of the affidavit  
2 that he submitted recently with regard to his own personal  
3 financial wherewithal. What has been offered as adequate  
4 assurance is enough. So I will deny each of the objections  
5 and on the additional agreements that were set forth on the  
6 record today, find that there is sufficient adequate  
7 assurance to warrant the assignment to Mr. Shahery.

8 I also conclude that although it was not a basis  
9 for any written objection, the warehouse landlord's  
10 objection that the assignment shouldn't be made because  
11 there is a potential higher and better offer for the lease  
12 should be denied.

13 The decision whether to assume or reject the lease  
14 and then order to assign an assumed lease is one committed  
15 to a business judgment standard, not the corporate law  
16 business judgment standard with all its permutations  
17 developed over the years, but as enunciated by the Second  
18 Circuit, and in re Orion's Pictures Corp., 4 F.3d 1095 and  
19 1099, in which the Second Circuit said, "In reviewing a  
20 debtor's decision to assume a lease, and similarly, to  
21 assign it, the bankruptcy court places itself in the  
22 position of the debtor in possession and determines whether  
23 assuming it would be a good business decision or a bad one,  
24 i.e. where it's to the estate's economic advantage."

25 Frankly, it's already been established that the

1 decision to assume the lease was to the debtor's economic  
2 advantage, because I already authorized that assumption.  
3 The issue now is whether the assignment to Mr. Shahery,  
4 which is not subject to any additional due diligence or  
5 conditions for \$5,250,000 is an exercise of good business  
6 judgment.

7 It has been represented to me that this has been  
8 reviewed, not only by the debtor's real estate professionals  
9 and counsel, but also by a very active creditor's committee  
10 that is counting every penny in this case. It was noticed  
11 for approval and there were no objections by any party and  
12 interest except for the oral objection at this hearing by  
13 the landlord, who conceitedly admitted that it did not know  
14 the terms of the other offer, but merely that a  
15 communication was made to the landlord by a prospective  
16 offeror for the lease, that the debtor has confirmed was for  
17 a higher place; over \$2 million more.

18 The debtor has explained that it did not accept  
19 that offer because it was a conditional offer; it was  
20 conditioned on 60 days of due diligence. Normally, just on  
21 its face, that would be not enough to turn down an offer  
22 unless the debtor needed cash immediately. However, it  
23 appears to me there are two important considerations,  
24 informing the debtor's business judgment.

25 First, it's conceded that the roof on the

1 warehouse needs, at a minimum, work, and may need to be  
2 replaced. That generally is a fairly expensive proposition.  
3 The record today reflects that the outside amount could be  
4 in excess of \$2 million, if it were to be repaired -- I'm  
5 sorry, not repaired, but replaced.

6 Secondly, it appears based on the debtor's  
7 representations to me, and they have no reason to have  
8 misrepresented it given that Mr. Shahery is not an insider  
9 of the debtors, that the alternative prospective assignee  
10 had an interest in redeveloping the whole property. That  
11 interest combined with a potential due diligence outweighs,  
12 or, to my mind, at least, would raise the distinct risk that  
13 the bidder, having gotten its foot in the door, would  
14 promptly engage in negotiations with the landlord, which  
15 could well lead to irrigating a significant amount of the  
16 profit that the debtor would be receiving for assignment of  
17 the lease to the landlord for agreeing to modifications to  
18 the lease, and/or resolution of the roof issue.

19 All things considered, then, I don't believe that  
20 the delay by the debtor to consider that offer is warranted  
21 when it has the firm, unconditional offer by Mr. Shahery in  
22 hand. Given the relatively modest monetary difference  
23 between the two offers which, as I said, would be put at  
24 serious risk given the conditionality of the higher offer.

25 In part, I'm basing that decision, not only on my

1 own assessment, but also on the fact that the creditor's  
2 committee and no other party and interest has raised a  
3 concern about the debtor's decision to choose the Shahery  
4 proposal for the assignment.

5 So I'll ask the debtors to submit the order  
6 granting the motion. You should, in addition, reflecting  
7 the representations made on the record, put in the language  
8 reflecting the commitments by the landlord that have been  
9 set on the record.

10 MR. SILVERSTEIN: Thank you, your Honor.

11 MS. MARCUS: Thank you. We'll do that, your  
12 Honor.

13 THE COURT: Thank you.

14 MR. GRUMER: Will Counsel be stipulating the  
15 proposed order?

16 MS. MARCUS: Of course.

17 THE COURT: I think that's what you were asking,  
18 too. So, yes.

19 MS. MARCUS: Of course, we will.

20 THE COURT: Yeah. It does not have to be settled  
21 on formal notice, but you should be circulating the order  
22 for Counsel both to the warehouse and parking lot landlords  
23 before you submit it to chambers.

24 MR. TAXIN: Thank you, your Honor.

25 MR. GRUMER: Thank you, your Honor.

1 MR. REISS: Thank you, your Honor.

2 (Off the record.)

3 MR. FAIL: Good morning, your Honor. For the  
4 record, Garrett Fail, Weil, Gotshal & Manges for the  
5 Debtors. Are you ready to proceed with the next items?

6 THE COURT: Yes, sure.

7 MR. FAIL: Thank you, your Honor. So the next  
8 items on the agenda are under section 3, which we've titled  
9 collectively the administrative expense matters. There are  
10 eight items on the agenda today. Your Honor, we filed --  
11 the debtors filed an objection to these collectively at  
12 Docket 4854. The objection addressed 11 motions. Following  
13 our filing of the objection, roughly a quarter or three of  
14 the parties have asked to adjourn, and, your Honor, we would  
15 note and you may already know, that there were a number of  
16 other motions that were on the docket, very similar, that  
17 agreed or requested to adjourn, so the objection wasn't  
18 required to them.

19 These eight motions are a small subset in dollar  
20 and number of all potential administrative and/or priority  
21 claims. They are a small subset of the parties that filed  
22 claims to date, and it's a subset, as I mentioned of parties  
23 that have filed motions.

24 Your Honor, as we set forth plainly in the  
25 objection, we don't think that individual movements are

1 entitled to a determination that their claims are allowed or  
2 to force the debtors to reconcile or object to their claims.  
3 Any one of them ahead of others, especially on, you know, a  
4 14-day time period. Under the circumstances of the cases  
5 and prior confirmation of the plan, we also set forth that  
6 the movements are not entitled to immediate payment of any  
7 administrative claims. So for those two reasons, and as set  
8 forth more fully in the objection and based on the  
9 circumstances of the case, which your Honor is clearly aware  
10 of, we've asked that the motions be denied without  
11 prejudice.

12 As is clear from the docket and the record, the  
13 debtors have begun but certainly not completed the  
14 reconciliation of all of the pre-petition claims that have  
15 asserted priority. We're evaluating and working with the  
16 creditors' committee on additional ones. We filed three  
17 omnibus objections to several hundred claims asserting many  
18 millions of dollars. There are additional objections that  
19 will come.

20 And consistent with the approach, your Honor, as  
21 taken with respect to the prior motions, the process of "me  
22 first," "just me," "mine is just a small claim," isn't one  
23 that's sustainable or judicial efficient. Your Honor has  
24 set up claims procedures in these cases which are consistent  
25 with other procedures in many, many other mega cases where



1 the debtors control the timing of objections and then  
2 subsequently the setting of evidentiary hearing to the  
3 extent required. It's done to allow the debtors time to  
4 evaluate, negotiate, and plan the most efficient way  
5 forward, rather than to respond in a Whac-A-Mole fashion to  
6 parties that seek to have their claims allowed for trading  
7 purposes or otherwise.

8 I'm happy to answer any questions, your Honor.

9 THE COURT: Well, the debtors are approaching  
10 confirmation. The confirmation hearing is scheduled for  
11 September 18th, I think.

12 MR. FAIL: I believe that's right, your Honor.

13 THE COURT: Obviously, there's a requirement under  
14 Section 1129A to forming a plan that the plan provide for  
15 the payment of allowed administrative expenses --

16 MR. FAIL: The draft of the plan that's on file,  
17 that's been approved for solicitation, and that was  
18 solicited and does provide for that, your Honor.

19 THE COURT: Well, my question is how does the  
20 debtor's claim review process and objection process tie into  
21 the requirements of Section 1129 (a)(9), which says, again,  
22 "Except to the extent the holder of a particular claim has  
23 agreed to a different treatment, the plan provides that the  
24 holder will receive cash on the effective date"?

25 MR. FAIL: Sure.

1 THE COURT: I mean, obviously, if you have an  
2 objection pending, it's not an allowed claim yet, but it  
3 wasn't clear to me that your procedure contemplated those  
4 objections being filed before the confirmation hearing.

5 MR. FAIL: We are endeavoring to file objections  
6 on a rolling basis in advance of confirmation. That will  
7 address a subset, your Honor. I will also add that, you  
8 know, obviously, today is not a confirmation hearing.  
9 Certain of these parties have filed confirmation objections  
10 and other pleadings throughout the case as have other  
11 parties.

12 The administrative burden -- you know, our burden  
13 to satisfy the requirements of confirmation will be  
14 addressed and, we believe, met at the confirmation hearing.  
15 As is typical in many, many cases, you know, a bar date  
16 won't be set until pursuant to the confirmation order for  
17 administrative claims, so the debtors have estimates, the  
18 debtors will satisfy their burden, and certainly not  
19 precluding any opportunities to speak with and negotiate  
20 with administrative creditors between now and the  
21 confirmation hearing.

22 THE COURT: Right.

23 MR. FAIL: But the alternative, your Honor, which  
24 is being proposed by the creditors, is that because they've  
25 asked, we either need to respond or accept a default does

1 not seem to be appropriate, especially given, as we've  
2 already demonstrated in objections to hundreds of claims for  
3 hundreds of millions of dollars, accepting filed claims or  
4 asserted claims cannot be the answer. It is certainly not  
5 in the best interests of the estates generally or any other  
6 creditor.

7 The debtor's motivation and job and duty is to  
8 ensure that appropriate parties are paid amounts to which  
9 they're entitled, and the debtors are not prepared to allow  
10 the claims and -- I note what was put in the reply that the  
11 debtor didn't address in their objection the specifics of  
12 these particular motions, and, therefore, we didn't do  
13 enough, and therefore their claim should be allowed. But,  
14 your Honor, that's asking the debtors to take the bait. The  
15 debtors are saying they shouldn't be forced to reconcile one  
16 small claim ahead of the largest, or one individual bespoke  
17 claim when a number of claims could be addressed at the same  
18 time.

19 And the debtors didn't take the bait. We didn't  
20 go through and say, okay, we just have a little bit of an  
21 issue here. We haven't completed our preference review. We  
22 haven't completed, you know, a number of other things that I  
23 think the Court would expect the debtors to do before  
24 granting an allowed administrative claim. Your Honor is  
25 aware that we've already completed the sale, employees have

1       been transferred to Transform, access to records and  
2       employees are pursuant to those documents, and given ongoing  
3       litigation, are not immediate and perhaps not ideal, but  
4       those are the circumstances under which we're operating.

5               And the alternative to denying the request, which  
6       is to allow parties to play gotcha or to set a time  
7       limitation that's inconsistent with the plan. The plan that  
8       we proposed and solicited votes on provides for  
9       approximately subject to extensions which are regularly  
10      granted in mega cases. It just doesn't make any sense to  
11      the debtors.

12             THE COURT: And I guess it's implicit of what you  
13      said, but I just want to get it out. The debtors,  
14      therefore, intend to show at the confirmation hearing that  
15      subject to any agreements by administrative expense  
16      claimants to defer payments, they will have sufficient cash  
17      at confirmation to enable payment of the estimated aggregate  
18      amount of allowed administrative expenses.

19             MR. FAIL: Your Honor, I'll say the debtors are  
20      prepared to meet the requirements for confirmation of the  
21      plan of the confirmation hearing, and under your Honor's  
22      question and would respectfully suggest that isn't the  
23      necessary -- that isn't the issue before the Court today.  
24      These motions seek allowance of eight party's claims for  
25      roughly, you know, 2- to \$4 million out of the estimated --

1 it's a small fraction of what was, you know, at dispute  
2 under the EPA of what were administrative claims that were  
3 supposed to be paid by one party, perhaps the other, of  
4 503(b)(9) claims that were estimated. So I just think that  
5 they're two distinct issues and the creditors that are  
6 raising the issues today are doing so in an attempt to exert  
7 pressure of plan objections by filing other objections to  
8 other motions. We're aware by virtue of their filing these  
9 motions that they've asserted claims; we'll be prepared to  
10 address those claims in the proper due course.

11 THE COURT: Okay.

12 MR. FAIL: Thank you, your Honor.

13 THE COURT: Uh-huh.

14 MR. BRONSON: Your Honor, Bruce Bronson in behalf  
15 of M&S Landscaping. My client is a small landscaping and  
16 general contractor who provided essential services to Sears  
17 and was promised to be paid on an ongoing basis post-  
18 confirmation. He has a claim of about \$276,000. It's for  
19 things like repairing the roof, fixing drains, maintaining  
20 the assets.

21 And this hearing was to be on for July, I was  
22 asked to adjourn it, you know, so that maybe in August  
23 there'd be a better idea of what was going on, and I can't  
24 understand why so many dollars in legal fees can be paid out  
25 and, you know, it should be pari passu with the other

1 administrative costs, and my client can't collect what we  
2 should have been getting on an ongoing basis.

3 He lays money out for his employees, he's laid  
4 money out for materials, and the bills are relatively small  
5 each one of them, but they're specific; gate motor not  
6 working; he comes in and replaces it. Roof leaks, he comes  
7 in and he fixes the roof. And I don't understand why he'd  
8 be convinced to do this work on behalf of Sears to maintain  
9 the properties and not be able to get paid.

10 THE COURT: Okay.

11 MR. BRONSON: Thank you, your Honor.

12 MR. HEMRICK: Good morning, your Honor. Chris  
13 Hemrick, Walsh Pizzi O'Reilly Falanga on behalf of GroupBy  
14 USA, Inc. your Honor, for present purposes, I just wanted  
15 to point out that my client performed third party IT and  
16 e-commerce services supporting the debtor's online retail  
17 platform from January through March of this year in the  
18 amount of \$420,000 --

19 THE COURT: And that's pursuant to an executory  
20 contract?

21 MR. HEMRICK: That's correct, your Honor, and I'm  
22 happy to go into the details of the claim, but just in  
23 response to what the debtors just represented, those  
24 services -- we filed a motion to enforce our rights in  
25 April, originally set for the May omnibus hearing.

1           The debtors had almost four months to respond to  
2           our claim. There were certain discussions that were had,  
3           and we agreed that the debtor would put its response to our  
4           motion in an advance of today's hearing on August 15th, and  
5           what we got was, well, generally I see it referred to as a  
6           non-objection. It's just not clear to me what the disputed  
7           issues are with respect to the facts underlying our claim.

8           There was a post-petition in January, there was a  
9           notice of assumption that our contract was designated as  
10          subject to assumption and assignment. Our client, I think,  
11          more than reasonable expected -- relied on that, expected  
12          the debtor wanted services continued. There has been no  
13          dispute to our post-petition invoicing. The services  
14          weren't objected to --

15                 THE COURT: Was it assumed and assigned?

16                 MR. HEMRICK: The contract was rejected.

17                 THE COURT: It was rejected.

18                 MR. HEMRICK: But there are cases cited in our  
19          papers from the southern district and elsewhere; Bethlehem  
20          Steel is a Southern District Case that made clear that  
21          post-petition services provided pre-rejection are entitled  
22          to administrative expense data.

23                 So, you know, if there are issues that the debtors  
24          have with our claim, you know, I expected to hear them after  
25          four months in anticipation of this hearing, but I didn't

1 hear any issues. So I just don't see a reason why this  
2 issue can't be resolved, even if it's just the allowance of  
3 the claim, putting immediate payment to the side. And to  
4 the extent we get there today, your Honor, I'm happy to walk  
5 through the claim, but I wanted to make those preliminary  
6 remarks.

7 THE COURT: Okay. Let me -- Mr. Fail, the  
8 debtor's response in reference to orders of the court  
9 setting forth claim procedures. I'm familiar with the order  
10 setting forth procedures for section 503(b)(9) claims. I'm  
11 also familiar with an order dealing with the debtor's  
12 objection to claims, although I don't think that covers  
13 administrative expenses, but maybe I'm missing something.  
14 And then, of course, there's the general procedures order in  
15 the case, which -- that is the case management order, which  
16 deals with when an evidentiary hearing is scheduled and the  
17 like. But is there some order I'm missing, as far as --

18 MR. FAIL: Your Honor, I'm not sure that the  
19 supplement procedures orders don't cover it. I think the  
20 503(b)(9) are just prepetition claims. Prepetition claims  
21 are subject to the --

22 THE COURT: Right.

23 MR. FAIL: -- the claims, objections, or --

24 THE COURT: But this claim -- it's not a 503(b)(9)  
25 claim. It's a --



1 MR. FAIL: They're alleging a post-petition admin  
2 claim.

3 THE COURT: Right.

4 MR. FAIL: This is no different than what I  
5 described, someone saying, "But I just want mine. I told  
6 you a while ago that I wanted my payment."

7 THE COURT: There are two different issues.

8 MR. FAIL: Right.

9 THE COURT: There's the issue of allowance --

10 MR. FAIL: Yes.

11 THE COURT: -- and then there's the issue of  
12 payment.

13 MR. FAIL: Yes.

14 THE COURT: And Counsel said, well, at least my  
15 claim should be allowed.

16 MR. FAIL: Sure. Your Honor, that's all they're  
17 asking for.

18 THE COURT: The 503(b)(9) order lays out a  
19 procedure for dealing with those claims, and says that there  
20 wouldn't be any other procedure.

21 MR. FAIL: The procedure for administrative claims  
22 will be that any administrative claims not paid pursuant to  
23 a confirmation order, there will be an administrative claims  
24 bar date and the claims procedures would apply to -- they're  
25 not restricted to prepetition claims.

1           There's no procedure that says parties can seek a  
2           motion which a declaratory judgment or a demand for money,  
3           which would require an adversary proceeding, not a motion  
4           and 14-days' notice to say, here's what I'm owed. But more  
5           importantly, your Honor, the fact that group B, group I, has  
6           said, "I just want mine done and the gardener just wants his  
7           done." You know, they're different in the first  
8           instance -- one may be able to see if the lawn was mowed,  
9           but in terms of the contract that was ultimately rejected,  
10          perhaps that's a sign that value wasn't given or equal to  
11          what the cost was; it may be that, it may not -- and there  
12          may be facts -- I know that there are factual issues with  
13          regard to at least some of the parties that have filed  
14          motions where we don't believe that the value being sought  
15          in the claim, that the debtors got the value for that. And  
16          to set an after the official deadline by which the debtors  
17          are required or otherwise pay the administrative price for  
18          allegations just doesn't make sense. We know we have to  
19          reconcile.

20                 THE COURT: Now, again, I'm not talking about  
21                 payment. I'm just talking about --

22                 MR. FAIL: But allowance -- our position is that  
23                 once there is an administrative claims bar date that's set,  
24                 they'll be treated as claims in these cases. We have our  
25                 books and records of our accounts payable that have not been

1 paid. We have the issue ongoing with Transform as to what  
2 obligations were assumed. We're checking to see what  
3 obligations were paid by Transform. There's that set of  
4 issues.

5 THE COURT: Well, the first issue isn't an issue  
6 anymore, except on appeal.

7 MR. FAIL: Right, we've had. So over the course  
8 of when these motions were filed and during the cases --

9 THE COURT: Right.

10 MR. FAIL: -- there were those issues.

11 THE COURT: Right.

12 MR. FAIL: There are also issues --

13 THE COURT: So, for example, when this motion was  
14 filed in April, we were three-plus months away from  
15 determination who was going to pick this up --

16 MR. FAIL: Yeah. Correct.

17 THE COURT: -- i.e. the debtor or Transform.

18 MR. FAIL: Correct.

19 THE COURT: Which I just decided on July 31st.

20 MR. FAIL: Your Honor's recollection is better  
21 than mine. I'll stipulate to that.

22 THE COURT: Well, actually, that's not true; I  
23 decided the super priority claim at that point. I think  
24 I --

25 MR. FAIL: There are a lot of issues that are

1 interwoven.

2 THE COURT: I think I decided the other issue  
3 judge July with the 166 million loss.

4 MR. FAIL: Your Honor, we're not delaying for any  
5 purpose other than to do the right thing, to ensure that  
6 creditors that have not been paid are treated similarly. We  
7 intend to engage in discussions with administrative  
8 creditors so that debtors can meet their burden for  
9 confirmation.

10 These parties are a subset of the potential  
11 creditors that are out there similarly situated and the  
12 debtors are just trying to ensure that they're limited  
13 assets go to the proper parties. There are parties who have  
14 asserted administrative expense claims for amounts that we  
15 don't believe are entitled to administrative priority. We  
16 filed hundreds of objections to hundreds of millions of  
17 dollars to date, we're processing others, but additional  
18 information is required, and that analysis is ongoing,  
19 including with respect to preference and including with  
20 respect to investigation of whether, for example, the  
21 debtors told certain parties to stop performing or that the  
22 contracts would be rejected.

23 There are parties that have asserted royalty fees  
24 for minimum guarantees for a longer period that are  
25 substantially more than claims have been asserted. There

1 are thousands of claims out there. And with all due respect  
2 to ever one of the creditors, the debtors are charged with  
3 most efficiently administrating these estates. And the  
4 first-come, first-served model is often not the most  
5 efficient. And the repeat attempts by certain parties, the  
6 first, second, third come, isn't helping the situation.  
7 We're spending time --

8 THE COURT: Okay. Can I interrupt you just for a  
9 second?

10 MR. FAIL: Of course, your Honor.

11 THE COURT: Okay. Sorry. I was going to ask  
12 someone to look on the docket when that order was entered.  
13 The order dealing with the APA's interpretation of picking  
14 up the accounts payable. Do you remember that?

15 UNKNOWN SPEAKER: Your Honor, I'm happy to address  
16 that, if you'd like .

17 THE COURT: Just give me the date.

18 UNKNOWN SPEAKER: Your Honor, that dispute has not  
19 been finally resolved, because the obligations, if any, to  
20 Transform --

21 THE COURT: Oh, that's right. I gave an oral  
22 ruling, but ...

23 UNKNOWN SPEAKER: That's correct, your Honor. But  
24 it's subject to dollar for dollar reduction, based on  
25 shortfalls and specified receivables --

1 THE COURT: All right. Do you remember when that  
2 oral ruling was?

3 UNKNOWN SPEAKER: It was in late July.

4 THE COURT: Late July.

5 UNKNOWN SPEAKER: I don't remember the exact date,  
6 your Honor.

7 THE COURT: And there's no order yet?

8 UNKNOWN SPEAKER: That's correct. That is  
9 correct.

10 THE COURT: All right. All right.

11 UNKNOWN SPEAKER: It's ongoing reconciliation.

12 THE COURT: So that's not been finalized yet.

13 UNKNOWN SPEAKER: And there may ultimately, your  
14 Honor, be no obligations for Transform depending on the  
15 deducts or shortfalls and specified receivables and prepaid  
16 inventory.

17 THE COURT: Okay.

18 MR. FAIL: And, finally, your Honor, even the  
19 simplest ones, even the simplest administrative claims  
20 may -- the debtors may engage in conversations that effect,  
21 you know, with all administrative creditors, and we're using  
22 the time between now and confirmation to administer these  
23 dates most efficiently. We just think that granting these  
24 motions does not serve the interests of the estate; it would  
25 be entirely punitive.

1 And, your Honor, we respectfully request these  
2 motions can't be requested today. At most, they could be  
3 deferred, but we requested that they be denied without  
4 prejudice, which is all we've asked for. That allowance not  
5 be granted today, that payment can't be approved today.

6 THE COURT: Okay. I was just --

7 MR. FAIL: Sure.

8 THE COURT: -- responding to the one issue that  
9 the GroupBy USA had raised as far as timing.

10 MR FAIL: Sure, your Honor.

11 MR. HEMRICK: Your Honor, just briefly.  
12 Regardless of who is responsible ultimately for picking it  
13 up, to me that's a separate issue from whether the claim can  
14 be allowed.

15 THE COURT: I totally disagree, sir. Why would we  
16 spend countless hours litigating with the debtor if a third  
17 party is going to pay for it? That's a total waste of time;  
18 your client's money, debtor's money, the creditor's money,  
19 and my time.

20 MR. HEMRICK: So, but in that instance, your  
21 Honor, who is responsible for objecting to the claim; is  
22 that -- is it the debtor's?

23 THE COURT: Exactly. That's the point. You're  
24 right. Who is? We don't know yet. I have addressed that  
25 issue as far as I can and given a ruling on it, and the

1 parties are now doing the calculations. So your fight may  
2 be with Transform or may be with the debtor. I don't see  
3 how the debtor can be faulted for "sitting on your motion  
4 since April," given the existence of those issues.

5 MR. HEMRICK: All right. Very well, your Honor.

6 MR. LIBOU: Good morning, your Honor. Jason  
7 Libou, Wachtel Missry, LLC. I represent administrative  
8 creditor MaxColor, LLC in connection with this motion for  
9 allowance and payment of administrative expenses, docket  
10 number 4176. This is a relatively small claim compared to  
11 some of the other claims we've discussed. This is for a  
12 503(b)(1) and(b)(9) claims, for goods that were sold --

13 THE COURT: But (b)(9) is covered by my order.

14 MR. LIBOU: (b)(9) is covered by the order. So  
15 with respect to the (b)(1) claims, there's were claims for  
16 goods that were sold that were necessary for preservation of  
17 the estate. You know, we were told that a check was issued  
18 for payment of these claims and that it was then stuck in  
19 transit. We have been unable to get, you know, any kind of  
20 confirmation regarding that check or what actually happened  
21 to it. But with respect to the (b)(9) claims that  
22 concerned --

23 THE COURT: I'm not going to hear that today. I  
24 issued an order on that.

25 MR. LIBOU: On the (b)(1) claims.



1 THE COURT: And your motions are consistent with  
2 that order.

3 MR. LIBOU: Right. So for the (b)(1) claims --

4 THE COURT: It's dated --

5 MR. LIBOU: This is from July. We were asked to  
6 adjourn the motion.

7 THE COURT: No, no, the order is dated  
8 February 22, 2019.

9 MR. LIBOU: Okay. Yes, so those claims could be  
10 addressed in accordance with that order.

11 THE COURT: Okay.

12 MR. LIBOU: With the respect to the (b)(1) portion  
13 of the claims, we request these claims be allowed if not,  
14 you know, order to be paid, but if not, that they be  
15 allowed.

16 THE COURT: I just, you know, again, I don't --  
17 for each of these, the debtor has not objected on the merits  
18 of the claim. In a normal case, usually a rather smaller  
19 case than this one, if someone isn't paid for doing the  
20 landscaping or delivering goods post-petition, they make a  
21 motion for payment of the administrative expense. And if  
22 the debtor doesn't object to the merits of the motion, the  
23 claim is allowed and then there's the second issue of when  
24 it's paid.

25 This case is unusual in two respects; the first is

1 there is a substantial issue as to whether these types of  
2 claims are to be paid by the buyer, Transform, under the  
3 APA, or the debtor. And that issue was joined in July. I  
4 gave a ruling on it that required further calculation and  
5 further work, which is being done.

6 Secondly, this isn't a normal case, in part  
7 because in light of the first issue, and in part because  
8 perhaps even if Transform is obligated to pay a big chunk of  
9 these claims, the debtor may be administratively insolvent,  
10 in which case, it needs to step back and look very carefully  
11 at all these claims as a group and decide how to proceed  
12 with them. I gather, although I've not read the plan, that  
13 the plan proposes a mechanism for dealing with  
14 administrative expenses, including their allowance or  
15 disallowance, and if the plan is confirmed, that will  
16 govern -- that procedure will govern -- because it's the  
17 plan.

18 To me, both of those considerations strongly argue  
19 for not getting into piecemeal determination of the  
20 allowance of these claims today.

21 Lastly, under the case management order, this  
22 hasn't been noticed as an evidentiary hearing. Now, they  
23 haven't objected, so I understand everyone's argument, which  
24 is, you know, no objection, it should be allowed. On the  
25 other hand, I think there is a legitimate excuse for not

1 objecting, which is why should they spend the money doing  
2 the analysis and objecting if Transform is liable for it.  
3 So it seems to me that I shouldn't be dealing with the  
4 merits here at this point.

5 And I understand that it's incredibly frustrating  
6 to each of your clients, and as far as I know, they're all  
7 deserving. You know, there's the famous line about  
8 Dartmouth School, "but there are those who love it". Well,  
9 it's a small client, but they're all like that, you know?  
10 I'm sure Michigan and Penn State and Yale all say the same  
11 things about themselves, you know, as well as Daniel Webster  
12 saying it about Dartmouth.

13 So I just -- it's a very unfortunate situation; I  
14 appreciate that. But I think the debtors actually are doing  
15 what they can to deal with it. We had a lengthy hearing on  
16 super priority claims asserted by ESL and Cyrus and the  
17 indenture trustee that would have primed all of your  
18 clients, for example, to the extent that Transform didn't  
19 pick it up. We had that completed on July 31st and a  
20 proceeding on the APA issues was, I think, a couple of weeks  
21 before then.

22 So it's not as if the debtors are just, you know,  
23 going out for a pack of cigarettes and they're never coming  
24 back; they're really working on this. I don't know what  
25 more to say on those two points.

1 MR. LIBOU: Thank you, your Honor.

2 THE COURT: Okay.

3 MR. CAVALIERE: May I briefly be heard, your  
4 Honor?

5 THE COURT: Sure.

6 MR. CAVALIERE: Your Honor, Rocco Cavaliere,  
7 Tarter, Krinsky & Drogin On behalf of Alpine Creations, Ltd.  
8 Your Honor, there are some statements in the objection, and  
9 also today, with respect to some creditors doing an Enron,  
10 if you will, and a Whac-A-Mole kind of situation.

11 THE COURT: Right.

12 MR. CAVALIERE: I've been watching these --

13 THE COURT: I'm sorry, what is your client again;  
14 which one?

15 MR. CAVALIERE: Alpine creations, Ltd. I

16 THE COURT: Okay. All right.

17 MR. CAVALIERE: I've watched --

18 THE COURT: I don't see you -- well, look, the  
19 only ones who are doing Whac-A-Mole, I think, are the  
20 503(b)(9) folks, because there's a specific order dealing  
21 with that. You are certainly to entitled to file a motion  
22 saying our client is owed an administrative expense for -- I  
23 think Alpine was --

24 MR. CAVALIERE: Alpine is -- we have a  
25 \$202,000 503(b)(1) claim and a 677,000 503(b)(9) --

1 THE COURT: So you were doing Whac-A-Mole on the  
2 (b)(9), but on the other one, you know, I understand that  
3 point. But, again, it just doesn't seem to tie into the  
4 reality of the case, unless I'm missing something. I don't  
5 think there's any order that precludes you from the  
6 administrative expense claim the way you did on the  
7 503(b)(1).

8 MR. CAVALIERE: That is correct, your Honor. And  
9 with respect to the 503(b)(9), the procedure ordered in  
10 respect of that suggest that if all parties were to file  
11 administrative 503(b)(9) claims for claim reconciliation.  
12 But in my view, it was not intended to me that we have to  
13 wait an unlimited period of time, any until after  
14 confirmation for the debtor to weigh in on these. The  
15 intent of it was file your proof of claim form and at some  
16 point the debtor would look at it. In fact, at an earlier  
17 period in this case, there was a winner's motion -- March  
18 15th, debtor's counsel filed a motion and said that the  
19 503(b)(9) aspect should be adjourned until May or June. It  
20 wasn't necessarily to be adjourned until an unlimited period  
21 of time. We specifically waited, your Honor, not to file  
22 our motions early in this case because we thought that it  
23 made no sense --

24 THE COURT: Well, that was for any pending  
25 503(b)(9) motions. Not -- I mean, that's a specific --

1 paragraph 20 says that, "pending 503(b)(9) motions be  
2 adjourned to a date no later than 60 days after the general  
3 bar date."

4 MR. CAVALIERE: Okay. All right. My point, what  
5 I just really want to say, your Honor, we could have filed  
6 our 503(b)(1) motion as well earlier. We decided to wait  
7 because, as your Honor pointed out, there were some  
8 significant disputes. But once the 507(b) dispute got  
9 resolved, and we are in the pendency of having a  
10 confirmation hearing just a few weeks away in which these  
11 claims should be allowed, it's a little less work for the  
12 debtors to do to estimate these claims. All they need to do  
13 is review these --

14 THE COURT: Well, they're going to estimate --  
15 they have to estimate them for purpose of confirmation, to  
16 assure me -- unless people are going to say, "I'll wait  
17 pursuant to a payment schedule." But that's a different  
18 story. And, again, why should they -- I mean, one of the  
19 reasons they sold to Transform was so Transform would pick  
20 up these types of claims, so why should they be doing the  
21 work? Now, I know there are other provisions of the  
22 agreement that may be an offset, and that's what I left  
23 open, because I think both sides didn't quite get it right  
24 in their calculations, and I've been told they're furiously  
25 trying to figure out how to do it. And I said if they

1       couldn't do it, I'd appoint an examiner that helped them and  
2       helped me decide.

3               So, again, this is an unusual situation. I mean,  
4       it's --

5               MR. CAVALIERE: I understand. There are limited  
6       resources, your Honor, and my client is just frustrated;  
7       they've been waiting for payment for a long time --  
8       patiently waiting. We decided to bring this before the  
9       Court.

10              THE COURT: Right.

11              MR. CAVALIERE: On the other hand, there are  
12       precious resources that are still going out the door to  
13       other parties, which my client is frustrated about as well.  
14       We are concerned about preserving estate resources --

15              THE COURT: Well, I'm not aware of a whole lot.

16              MR. CAVALIERE: -- no money should be going out the  
17       door, and we'll wait like everybody else to get paid at the  
18       same time.

19              THE COURT: Okay. I do think that I've seen  
20       certain motions to seal that if -- your last statement was a  
21       reference to the payment of professional fees, there is  
22       enough in the future that hasn't been paid yet to cover  
23       administrative insolvency issues there, if they arise.

24              MR. CAVALIERE: I certainly hope so. I think when  
25       your Honor asked earlier to Mr. Fail whether there would be

1 a reserve, it wasn't 100 percent clear whether there would  
2 be a reserve for all --

3 THE COURT: Well, that's a confirmation issue.

4 MR. CAVALIERE: That's correct.

5 THE COURT: I understand.

6 MR. CAVALIERE: But there was no representation on  
7 the record that suggested that -- to assure the court that  
8 there would be.

9 THE COURT: That may be, but, again, we're going  
10 to hear that next month --

11 MR. CAVALIERE: Okay. Thank you, your Honor.

12 THE COURT: -- September 18th.

13 MR. SCHNITZER: Good afternoon, your Honor.

14 Edward Schnitzer from Montgomery McCracken on behalf of  
15 Vehicle Service Group, LLC. Our motion was 4728. I just  
16 wanted to make three points, your Honor. One, to the extent  
17 there was a suggestion that the motion was improper, I do  
18 think it is permitted under 503(b). Your Honor, I  
19 understand --

20 THE COURT: Well, again, unless it's a -- but  
21 yours, I don't think, was a 503(b)(9), right?

22 MR. SCHNITZER: Ours had a small 503(b)(9)  
23 section, but --

24 THE COURT: Okay. All right.

25 MR. SCHNITZER: -- but the bulk, the 170,000, was



1 503(b)(1).

2 THE COURT: Okay.

3 MR. SCHNITZER: Your Honor, I did want to note,  
4 those goods and services were provided back in January, and  
5 I know you've expressed you understood this. From my  
6 client's perspective, they provided this in January to a  
7 debtor in bankruptcy. They did expect to get paid in the  
8 ordinary course of business. We're not seven months later,  
9 and it sounds like another six months from now. So as  
10 you've expressed, your Honor, that's frustrating from my  
11 client's point of view.

12 And the last thing, your Honor, I wanted to  
13 address, if you are not inclined to grant the motion, either  
14 even in just the sense of allowing the claim, your Honor, I  
15 would ask that it not be missed, even without prejudice, but  
16 instead it be adjourned and be kept --

17 THE COURT: Yeah, I don't see a reason to dismiss.  
18 I mean, you filed it; I think it just should be adjourned.

19 MR. SCHNITZER: Your Honor, the debtors are have  
20 said --

21 THE COURT: And I think the hearing -- well, at  
22 the confirmation hearing would be the time for me to decide  
23 when it should be adjourned to; it should adjourned to after  
24 the confirmation hearing, but I should be able to decide  
25 then how long and under what circumstances.

1 I'm looking for my notes on yours --

2 MR. SCHNITZER: It was originally ten in the  
3 original agenda, but I think it moved in the amended --

4 THE COURT: -- Vehicle Services Group. Right.  
5 It's just my own memo on this. So this is part of an  
6 executory contract, too.

7 MR. SCHNITZER: Correct. That was rejected  
8 subsequently.

9 THE COURT: So, I mean, again, I think the debtors  
10 are kind of doing a priority triaging on these types of  
11 claims, but there's a whole group of claims that fall into  
12 executory contract claims, where you look at the -- that  
13 aren't landlord claims -- where you look at whether, you  
14 know, they really got the value that's in the contract.  
15 There's a whole separate set of ones as far as just vend or  
16 agreements, where you look at just the invoices and are they  
17 accurate --

18 MR. SCHNITZER: Understood.

19 THE COURT: That's a whole separate group of  
20 people that look at that. So I'm assuming that they're  
21 doing that type of, you know, siloing or whatever buzzword  
22 you want to do on those types of analyses.

23 MR. SCHNITZER: Understood, your Honor. Another  
24 client has received an e-mail from them, asking for  
25 information to reconcile 503(b)(9), so I don't doubt they're

1 doing something.

2 THE COURT: Okay.

3 MR. SCHNITZER: Thank you, your Honor.

4 THE COURT: All right.

5 MR. SARACHECK: I'll be brief, Judge.

6 MR. ARNOLD: Good morning, your Honor. Todd  
7 Arnold of Neale Bender Yoo & Brill appearing on behalf of  
8 Weihai Lianqiao.

9 THE COURT: Okay. Good morning.

10 MR. ARNOLD: At the risk of beating a dead horse,  
11 I have many of the same points. I just wanted to note for  
12 the Court that attached to our reply as Exhibit 1 is the  
13 e-mail string that I had with debtor's Counsel, starting six  
14 months ago, when we tried to engage in a process with the  
15 debtor to try to reconcile the administrative claims that  
16 were asserted in the motion. We got no response from the  
17 debtor, which led to us being, in our opinion, forced to  
18 file the motion for allowance of the administrative claim,  
19 especially with confirmation upcoming.

20 I think it's a little disingenuous for the debtors  
21 to worry about a race to the courthouse for administrative  
22 creditors that are supplying goods post-petition and to pay  
23 those claims, but not to have the same concern for  
24 professionals that rushed into court and protected their  
25 ability to have their claims allowed, at least on an interim

1 basis, and that seem to be continuing to be paid at least at  
2 80 percent.

3 My client is willing to give up the request to  
4 have his claim paid right now. We understand that it will  
5 have to be paid in accordance with the plan if it's  
6 confirmed, but we do think that in light of our efforts to  
7 try to reconcile the claim for six months, not in response  
8 to that effort and not on substantive response to the  
9 motion, that the claim should at least be allowed.

10 THE COURT: Well, again, the February 22nd order  
11 covers the 503(b)(9) claims and most of this claim falls in  
12 that category. The rest is the post-petition goods which,  
13 again, I've already ruled, covered by the APAs, subject to  
14 the fact that there may be set offs on the APA. So, I mean,  
15 I'm not hearing anything different on that.

16 MR. ARNOLD: Understood, your Honor. Again, I  
17 don't see any opposition on the 503(b)(1). I understand the  
18 issue about Transform possibly being required or responsible  
19 to pay part of them.

20 On the 503(b)(9), the court order said in the  
21 procedures for reconciliation and allowance of 503(b)(9)  
22 claims, the order on Docket Number 2676, at paragraph 19,  
23 indicates that 19B, "if the debtors and the lender can't  
24 reach agreement regarding a 503(b)(9) claim, the debtor will  
25 schedule the matter for hearing by the court no later than

1 60 days after being requested to do so, by the lender.

2 THE COURT: Okay. Was that done?

3 MR. ARNOLD: My e-mail string with the debtor's  
4 counsel is attached to our reply, docket number 4900 at  
5 Exhibit 1. And on February 25th, I sent an e-mail  
6 referencing order 2676 and asking for reconciliation of a  
7 503(b)(9) claim.

8 THE COURT: Did you ask them to schedule the  
9 hearing?

10 MR. ARNOLD: I did not specifically ask to  
11 schedule the hearing, but I clearly ask for --

12 THE COURT: Okay.

13 MR. ARNOLD: -- reconciliation and didn't hear  
14 anything back.

15 THE COURT: All right. Well, I mean; okay.  
16 That's what that provision requires. As far as the --  
17 again, as far as the professional fees, A, is on an interim  
18 basis, and, B, 20 percent of each fees is a lot of money.

19 MR. FAIL: And C, your Honor, subject to a -- the  
20 secured lender is collateral. It's entirely different.

21 THE COURT: It's subject to a carve-out beyond  
22 that, but I'm just saying I think that well, the concern  
23 generally is a real one, I think under the facts, and at  
24 least my understanding of the possible risk of  
25 administrative insolvency, the facts don't require changing

1 the compensation procedures order.

2 MR. SARACHEK: Can I be heard, your Honor?

3 THE COURT: Sure.

4 MR. ARNOLD: Understood, your Honor. I  
5 appreciated the chance to be heard, and, obviously, I think  
6 you're hearing from a lot of the administrative creditors'  
7 frustration, which the Court is acknowledging. I appreciate  
8 that is a bad situation, as it has been with many of these  
9 large retailer cases.

10 THE COURT: Okay.

11 MR. SARACHEK: Your Honor, Joseph Sarachek on  
12 behalf of Mingle Fashion. This claim is clearly a 503(b)(1)  
13 claim. It was post-petition goods. It's \$44,000.

14 Sears in Hong Kong acknowledged that this was a  
15 post-petition order, post-petition goods, and, again, like  
16 the others, all we want, as the claim allowed, we  
17 recognize -- and I will say my client is very, very  
18 sophisticated and said to me the other day, "Explain me  
19 this, Mr. Sarachek, aren't I on the same level as attorneys  
20 and other professionals in this case?" They actually went  
21 back and read your order. And this carve-out is actually  
22 the money of unsecured creditors. So they said, why are  
23 professionals getting paid --

24 THE COURT: Well, they are an unsecured creditor.

25 MR. SARACHEK: Understood. But they are pari

1 passu -- They should be pari passu-- and they -- yesterday,  
2 we, actually, at our client's request filed an objection to  
3 the latest set of the applications that were filed. We  
4 don't think any further fee applications should be  
5 approved -- no further money should be approved until it's  
6 shown that this case is administratively insolvent.

7 The debtors, Transform, various parties, have all  
8 said that there's a reasonable likelihood -- and, your  
9 Honor, you know that the parties are having discussions,  
10 myself, there's 50 million in 503(b) -- we're all having  
11 discussions with the uninsured creditors committee, with the  
12 debtor; we all need to be brought together to get -- prior  
13 to September 18th -- to get a real fix on the number, the  
14 number that we're not being given, your Honor, and you  
15 really need to hear this, is, hey, if the 503(b)(9) is \$180  
16 million dollars and the 503(b)(1) number is \$60 million, is  
17 there \$240 million dollars available to pay those  
18 administrative creditor his? And we're getting the run  
19 around, all of us, collectively.

20 And I say all of us on the creditor's side. We're  
21 being told, well, Transform has the information. We don't  
22 have the information, this, that the other -- we need the  
23 Court's intervention. We need a mediator --

24 THE COURT: Well, I have the hearing scheduled for  
25 September 18th; that's the -- the debtors have that booked.

1 MR. SARACHEK: But prior to that, we --

2 THE COURT: Well, clearly, allowing a \$47,840  
3 claim is not going to help them.

4 MR. SARACHEK: It's not going to -- well, I get  
5 that, your Honor. The issue -- we're the pimple on the  
6 elephant's back.

7 THE COURT: The aggregate administrative expenses  
8 is not the pimple on the elephant's back; it's a very  
9 important thing.

10 MR. SARACHEK: No, no. We're -- the \$47,000 is  
11 the pimple.

12 THE COURT: No, but what I'm saying is I think the  
13 issue that is really of legitimate concern that you've just  
14 raised is an issue that, obviously, I have to have a really  
15 good record on for confirmation. And as these debtors and  
16 the committee know, because they've done it hundreds, if not  
17 thousands of times, it's a good idea to develop that record  
18 well before, and if you need to, because it's important to  
19 reduce the number of objections and/or maybe a build a  
20 consensus; share. They know that. But, again, literally on  
21 the 31st, I decided issues involving hundreds of millions of  
22 dollars, so --

23 MR. SARACHEK: Understood.

24 THE COURT: -- so they couldn't really have given  
25 you that number before the 31st, because they didn't know



1 how it was going to come out. So, you know, I'm assuming  
2 that there will be that level of disclosure before then, and  
3 if there isn't, I need to decide it at the confirmation  
4 hearing, which isn't very far away.

5 MR. SARACHEK: No, it's not far away at all.

6 THE COURT: Okay.

7 MR. SARACHEK: Thank you.

8 THE COURT: Okay.

9 MR. HERZ: Your Honor, I won't belabor prior  
10 points. My name is Michael Herz of Fox Rothchild on behalf  
11 of Aspen Marketing Services. Just to -- I share in all the  
12 other concerns that have been mentioned today.

13 My client filed a motion to allow and compel  
14 payment of an administrative expense claim under 503(b)(1).  
15 It was filed on May 23rd under docket number 4001. My  
16 client provided marketing services back in December 2018 and  
17 January 2019. It thought at the time it would get paid in  
18 the ordinary course, so it's been waiting for a while. The  
19 invoices for the services are all of two pages. We had  
20 contact with debtor's counsel in early June to adjourn the  
21 original return date at the end of June, on the  
22 understanding that there'd be discussions in the interim.  
23 My understanding, there has been no discussions until the  
24 omnibus objection was filed.

25 Again, we share the concerns -- my client, as

1 others have noted, are simply looking to have his claim  
2 allowed at this point -- payment would be nice, obviously --  
3 but to have the claim allowed would, under the  
4 circumstances, be understandable.

5 I also share your Honor's concerns. You mentioned  
6 earlier about the 1129(a)(9) issues approaching  
7 confirmation. I know you asked Counsel about that and it  
8 seems like it's unclear how that will be addressed as we get  
9 towards confirmation, which is steadily approaching. So I  
10 would join everyone else who has appeared today and ask the  
11 motions not be denied and the claims be allowed, if  
12 possible, and that the confirmation issues be taken into  
13 consideration as we approach confirmation, which is coming  
14 up very soon. Thank you.

15 THE COURT: Okay. Okay. Anything else? All  
16 right. I have several motions by parties in interest in  
17 this case, asserting a right to payment of an administrative  
18 expense under 503(b)(1), or (b)(9), or both, from one or  
19 more of the debtors. The dollar amount in the aggregate is  
20 about \$4 million. Clearly, the dollar amount in the  
21 aggregate of all estimated unpaid administrative expenses in  
22 this case on the upside is far greater than that number.

23 As I said earlier, there is an order, and it has  
24 been in place in this case since February 22nd, governing  
25 procedures for the submission, consideration, and

1 determination, if necessary by the Court, of administrative  
2 expense claims under 503(b)(9) of the bankruptcy code.  
3 There is no order specifically dealing with administrative  
4 expense claims or motions under 503(b)(1) of the bankruptcy  
5 code, with the exception of the amended case management  
6 order, which is -- I think, is only relevant here in the  
7 sense that the initial hearing on any motion is  
8 presumptively as stated in that order, paragraph -- well,  
9 it's presumptively stated in that order as an  
10 non-evidentiary hearing subject to specific requests to hold  
11 an evidentiary hearing. And there's no bar generally under  
12 the bankruptcy code of rules on a right to seek payment of a  
13 post-petition administrative expense.

14           However, ultimately, the court, in managing its  
15 docket, has a great deal of discretion in deciding how to  
16 deal with litigation, particularly where that litigation may  
17 involve a large number of claims, and it is, as evidenced by  
18 the 503(b)(9) order, quite common in large Chapter 11 cases  
19 where there are a large number of potentially contested  
20 claims for procedures to be developed to deal with them.  
21 For example, in this case, there are procedures for dealing  
22 with personal injury claims and the like, as there are in  
23 other cases.

24           The debtor has objected to each of these motions  
25 on two grounds. First, it asserts that the Court should not

1 hear the merits of the motions, given that they comprise  
2 only a small number of administrative expense claims within  
3 a much larger universe of such claims that need to be  
4 reviewed, potentially negotiated, and/or investigated and  
5 then dealt with, if necessary, by the Court, all in an  
6 orderly fashion.

7 If that were the only consideration, I might put  
8 more fire to the debtor's feet to do that process now,  
9 particularly given the high priority of administrative  
10 expenses and the adverse effect on administrative expenses  
11 creditors of not being paid. However, this case presents  
12 certain unusual facts that, to my mind, justify the debtor's  
13 position on dealing with the specific motions and the  
14 inevitable fact that if I dealt with those motions today on  
15 the merits, I would have to inevitably have to deal with  
16 them with hundreds more, I believe, in the near future, and  
17 of course the debtors would have to do so in advance of  
18 that.

19 As I said during oral argument, there is a  
20 significant issue as to whether the debtor, or the debtors,  
21 on the one hand, or the buyers substantially and all of  
22 their assets, Transform is responsible for paying a  
23 substantial amount of these types of claims. That issue was  
24 raised promptly after the asset purchase agreement was  
25 closed -- in fact, it was raised before then -- although

1 then in the summary proceeding context as discussed by Orion  
2 Pictures when I asked to approve the associate purchase  
3 agreement -- but that issue is not yet resolve, although the  
4 Court has issued oral rulings that several constrain the  
5 remaining open issues which are still being calculated. And  
6 that was in July.

7 In addition, the debtors faced hundreds of  
8 millions of dollars of super priority claims under Section  
9 507 -- I'm sorry, 502(b)(7)-- I'm sorry, 503(b)(7) for  
10 diminution and collateral value, which would have made a lot  
11 of the -- if I had determined those claims in a particular  
12 way -- would have guided the debtor and the Court in  
13 determining how to liquidate of more junior administrative  
14 expense claims. That issue was decided only on July 31st.

15 So I don't fault the debtors for not yet having  
16 developed an overall approach to dealing with these types of  
17 claims so that they could specifically deal with these  
18 several motions before me on the merits as well as the  
19 inevitable large number of administrative expense claim  
20 allowance motions that would follow.

21 I have the hearing on confirmation of the debtors  
22 chapter 11 plan coming on September 18th; at least it's  
23 currently scheduled. It was adjourned from today, actually,  
24 in light of my prior rulings that I've already mentioned, as  
25 well as the need now, in light of those prior rulings, to

1 address the administrative expense claims among other  
2 reasons for the adjournment. And I trust that the debtor  
3 and their professionals and the committee and its  
4 professionals, will, in fact, be doing that over the next --  
5 a little under three weeks. And if they don't have a proper  
6 record at that time and want to proceed, there will be a  
7 problem, or, if they don't have a proper record and they  
8 want some more time to develop one, including in culmination  
9 with groups of administrative expense creditors, they'll  
10 probably get such an adjournment. But I don't believe it  
11 would make sense in managing a docket of this case, even  
12 taking into account the adverse economic effect of  
13 nonpayment on the individual claimants, to decide these  
14 motions on the merits at this point or, rather, to compel  
15 the debtors between now and an evidentiary hearing that I  
16 would have on them, to submit a supplemental briefing.

17 The other basis for the debtor's objection is to  
18 the second aspect of each the motions, which each seek not  
19 only allowance, but immediate payment of the administrative  
20 expense. The code doesn't actually specify when an  
21 allowable administrative expense should be paid, although it  
22 does set an outside date, absent the administrative expense  
23 creditors for payment, i.e., as provided in  
24 Section 1129(a)(9) of the plan as a condition to the  
25 effective date of a plan.

1 And the question of whether an administrative  
2 expense should be paid sooner than that is well recognized  
3 to be left to the discretion of the bankruptcy court; see in  
4 re Baptist Medical Center of New York, Inc., 52 B.R. 417,  
5 421 (E.D.N.Y. 1985), affirmed 7/91 F 2nd, 973, (Second  
6 circuit 1986), and the cases cited therein, including, and  
7 then thereafter by other circuit courts, including the 9th  
8 Circuit, the 11th Circuit, and in re Colortext Industries,  
9 Inc., 19 F.3rd, 1371, 1384, 11th Circuit, 1994.

10 Generally speaking, courts are perfectly  
11 comfortable with and, in fact, often direct immediate  
12 payment if there are no issues as to administrative  
13 insolvency and/or there is no need to go through a process,  
14 as one often does, particularly with Section 503(b)(9)  
15 claims for investigating, analyzing, negotiating, and  
16 ultimately decided whether to allow or not such claims, if  
17 there in a large number. See, for example, in re Pudgie's  
18 Development of NY, Inc., 239 B.R. 688, 692-93, (S.D.N.Y.  
19 1999) as well as in re Korea Chosun Daily Times, 337  
20 B.R. 773, Bankruptcy (E.D.N.Y. 2005).

21 On the other hand, where there are issues or  
22 doubts, at least as to whether the estate will ultimately  
23 prove to be administratively solvent, it's fairly routine to  
24 defer payment of administrative expenses until that issue is  
25 decided, id. see also in re Chi-Chi's, Inc., 305 B.R. 396,

1 401002, (Bankr. D. Delaware, 2004.)

2 I believe given all the facts here, even if I were  
3 to allow these claims today, which I'm not doing, it would  
4 be inappropriate to direct immediate payment, given issues  
5 regarding administrative insolvency that the claimants  
6 themselves have raised in one context or another, as well as  
7 that are -- the Court is well aware -- present in this case,  
8 although the debtors do believe they will be able to satisfy  
9 1129 (a)(10) -- I'm sorry, (a)(9) -- at the confirmation  
10 hearing.

11 So I will adjourn these motions. The date for the  
12 motions should be fixed after the confirmation hearing. And  
13 in light of the record, the confirmation including the 1129  
14 (a)(9), showing that the debtor's make and my sense of the  
15 process that they are proposing to continue their  
16 investigation and liquidation of claims.

17 And I want to be clear, notwithstanding the issues  
18 pertaining to the Transform agreement and the 503(b)(7)  
19 super priority claim, the debtor have been working on the  
20 liquidation of priority claims as detailed in their  
21 response; it's just that that work is not complete.

22 So that's my ruling on this matter. I don't  
23 believe I need an order, since I'm just adjourning the  
24 motions; I'm not denying them. So if one thinks there needs  
25 to be an order, they can suggest submitting one, but I don't



1 think there needs to be one at this point.

2 MR. FAIL: Thank you, your Honor. That concludes  
3 today's agenda. And we do appreciate your time, as always.

4 THE COURT: Okay. Great. Thank you.

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I N D E X

RULINGS

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Motion to Authorize: Motion of Debtors for Modification of  
Retiree Benefits (document #4635)  
Objection to Motion Objection of Retirees Committee to  
Debtors Motion for Modification of Retiree Benefits (related  
document(s)4635)

Adjourned 18 19

Cure Objection of Alan Robbins, Benderson Development  
Company LLC, Brookfield Properties REIT, Inc., Gray  
Enterprises, LP, Graziadio Investment Company, Gregory  
Greenfield & Associates, Ltd., LBA Realty LLC, LF2 Rock  
Creek LP, Nassimi Realty LLC, Regency Centers, L.P., Site  
Centers Corp., Spiegel Properties, The Woodmont Company, and  
Weingarten Realty Investors Relating to Debtors' Notices of  
Assumption and Assignment of Additional Designatable Leases  
in Connection with the Global Sale Transactions (related  
document(s)3299, 3298, 3211) filed by Robert L. LeHane on  
behalf of The Woodmont Company, Spiegel Properties, Nassimi  
Realty LLC, LF2 Rock Creek LP, Graziadio Investment Company,

1 Alan Robbins, Benderson Development Company LLC, Brookfield  
2 Property REIT Inc., Gray Enterprises, Gregory Greenfield &  
3 Associates, Ltd., LBA Realty LLC, Regency Centers Corp.,  
4 SITE Centers Corp., Weingarten Realty Investors  
5 (document #3553)

6  
7 Overruled 28 12

8  
9 Objection to Motion filed by David R Taxin on behalf of 5525  
10 S. Soto St. Associates (document #4829)

11  
12 Objection (related document(s)4763) filed by Kenneth  
13 Friedman on behalf of 51st Street Fruitland Ave., LLC  
14 (document #4883)

15  
16 Denied 75 6

17  
18 Motion for Allowance and Payment of Administrative Expense  
19 filed by Christopher Matthew Hemrick on behalf of GroupBy  
20 USA, Inc. (document #3404)

21  
22 Debtors' Omnibus Objection to Vendors Motions for Allowance  
23 and Payment of Administrative Expense Claims (document  
24 #4854)

25

1 Reply to Motion (related document(s)3404) filed by  
2 Christopher Matthew Hemrick on behalf of GroupBy USA, Inc.  
3 (document #4935)  
4  
5 Motion to Allow and Compel Payment of Administrative Expense  
6 Claim Under 11 U.S.C. section 503(b) for Services Provided  
7 to the Debtor Post-Petition filed by Kathleen M. Aiello on  
8 behalf of Aspen Marketing Services, Inc. (document #4001)  
9  
10 Debtors' Omnibus Objection to Vendors Motions for Allowance  
11 and Payment of Administrative Expense Claims (document#4854)  
12  
13 Joinder to the Replies of Alpine Creations Ltd. and Weihai  
14 Liznqiao International Coop. Group Co., Ltd. to Debtors'  
15 Omnibus Objection to Vendors' Motions for Allowance and  
16 Payment of Administrative Expense Claims (document #4904)  
17  
18 Joinder of Aspen Marketing Services, Inc. To Responses to  
19 Debtors' Omnibus Objection to Vendors' Motions For Allowance  
20 and Payment of Administrative Expense Claims (document  
21 #4918)  
22  
23 Motion of Max Color for Payment of Administrative Expenses  
24 filed by Jason Louis Libou (document #4176)  
25

1 Debtors' Omnibus Objection (document #4854)

2

3 Motion to Compel Payment of Administrative Expenses filed by  
4 H. Bruce Bronson, Jr. on behalf of M&S Landscaping Inc  
5 (document #4306)

6

7 Debtors' Omnibus Objection (document #4854)

8

9 Motion to Allow- Notice of Motion and Motion of Alpine  
10 Creations Ltd. To Allow and Compel Payment of Administrative  
11 Expense claim Under 11 U.S.C. Sections 503(b)(1) And 503  
12 (b)(9)(document #4631)

13

14 Debtors' Omnibus Objection (document #4854)

15

16 Alpine Creations Ltd.'s Reply (document #4893)

17

18 Joinder to the Replies of Alpine Creations Ltd. and Weihai  
19 Lizaqiao International Coop. Group Co., Ltd to Debtors'  
20 Omnibus Objection to Vendors' Motions for Allowance and  
21 Payment of Administrative Expense Claims (document #4904)

22

23 Joinder of Aspen Marketing Services, Inc. To Responses to  
24 Debtors' Omnibus Objection (document #4918)

25

1 Motion for Payment of Administrative Expenses(document  
2 #4689)  
3  
4 Debtors' Omnibus Objection (document #4854)  
5  
6 Motion for Payment of Administrative Expenses Notice of  
7 Motion of Weihai Lianqiao International Coop. Group Co., Ltd  
8 To Allow and Compel Payment of Administrative Expense Claims  
9 Under 11 U.S.C. 503(b)(1) AND 503 (b)(9) (document #4706)  
10  
11 Debtors' Omnibus Objection (document #4854)  
12  
13 Joinder to the Replies of Alpine Creations Ltd. and Weihai  
14 Lianqiao International Coop. Group Co., Ltd to the Debtors'  
15 Omnibus Objection to Vendors' Motions for Allowance and  
16 Payment of Administrative Expense Claims (document #4904)  
17  
18 Weihai Lianqiao International Coop. Group Co., Ltd's Reply  
19 to Debtors' Omnibus Objection (document #4900)  
20  
21 Joinder of Aspen Marketing Services, Inc. To Responses to  
22 Debtors' Omnibus Objection (document #4918)  
23  
24 Motion to Allow/Motion of Vehicle Services Group, LLC d/b/a  
25 Rotary, a Dover Company, for Allowance and Payment of

1 Administrative Claim Under 11 U.S.C. 503(b)(1) and 503  
2 (b)(9)(document #4728)  
3  
4 Debtors' Omnibus Objection (document #4854)  
5  
6 Joinder to the Replies of Alpine Creations Ltd. and Weihai  
7 Liznqiao International Coop. Group Co., Ltd. to Debtors'  
8 Omnibus Objection to Vendors' Motions for Allowance and  
9 Payment of Administrative Expense Claims(document #4904)

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11 Ruling 114 12

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C E R T I F I C A T I O N

I, Abigail Bayne, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Abigail  
Bayne

Digitally signed by Abigail Bayne  
DN: cn=Abigail Bayne, o, ou,  
email=digital1@veritext.com,  
c=US  
Date: 2019.08.27 15:24:19 -04'00'

Abigail Bayne

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: August 26, 2019